No. 884

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No. 35179. No. 35180.

Supreme Court of Ohio

Appeal from the Court of Appeals of Franklin County.

RAY M. BENJAMIN, ET AL.,
Plaintiffs-Appellants,
vs.
THE CITY OF COLUMBUS, ET AL.,
Defendants-Appellees.
No. 35179.

G. D. FERGUSON, ET AL.,
Plaintiffs-Appellants,
vs.
THE CITY OF COLUMBUS, ET AL.,
Defendants-Appellees.
No. 35180.

RECORD

OWEN B. SHERWOOD,
12 N. Third St., Columbus 15, Ohio.
McLESKEY & McLESKEY,
33 N. High St., Columbus 15, Ohio.
Attorneys for Plaintiffs-Appellants.

RUSSELL LEACH,
City Attorney.
JOHN C. YOUNG,
Senior Assistant City Attorney.
City Hall, Columbus 15, Ohio,
Attorneys for Defendants-Appellees.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC. Columbus 15, Ohio

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Plaintiffs' Witnesses

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Emil Windmiller	76	90		
Louis Wilson	109	111	113	
George W. Connor	113	115	116	
Norman B. Cook	116	118		
Ruth Craig	119	122		
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	Direct	Cross	Redirect	Recross
Alfred J. Lashley	149			
E. E. Kimberley	161	172	178	
A. E. Remmert	183	190	191, 192, 195, 196	191, 193, 195, 196
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IN THE COMMON PLEAS COURT OF FRANKLIN COUNTY, OHIO.

RAY M. BENJAMIN, GUY ODDI, BORIS H. SIEGEL, Michael Charie, G. D. Ferguson, Emil Windmiller, and Sarkis Anthony,

Plaintiffs,

vs.

THE CITY OF COLUMBUS, A MUNICIPAL CORPORATION Organized Under the Laws of the State of Ohio, Leo L. Phillips, as Director of the Department of Public Safety of the City of Columbus, Ohio, and George Scholer, as Chief of the Division of Police of the Department of Public Safety of the City of Columbus, Ohio,

Defendants.

PETITION.

[Filed March 8, 1955.]

Plaintiffs state that they and each of them are engaged, among other things, in the business of owning and operating amusement games in the city of Columbus, county of Franklin, and state of Ohio; that they have a common interest in the subject of this action and in the relief demanded; that the defendant, the City of Columbus, is a municipal corporation organized under the laws of the state of Ohio; that the defendant, Leo L. Phillips, is the director of the department of public safety of said city; that the defendant, George Scholer, is the chief of the division of police of the department of public safety of

said city; that as such said defendants are charged with the direction and enforcement of all safety ordinances of said city; and that plaintiffs bring this action on behalf of themselves, as well as on behalf of all other citizens and residents of said city who may be similarly interested.

Plaintiffs further state that each of them has owned and operated in said city of Columbus, Ohio, the following number of amusement games generally designated as "pin games," for the following periods of time, the equipment used in said games having the following values, to wit:

Name	Length of Operation	Number of Games	Value of Games
Ray M. Benjamin	7 years	75	$26,000.00
Guy Oddi	12 years	100	30,000.00
Boris H. Siegel	7 years	30	10,000.00
Michael Charie	18 years	100	40,000.00
G. D. Ferguson	9 years	20	10,000.00
Emil Windmiller	19 years	100	40,000.00
Sarkis Anthony	10 years	60	20,000.00

Plaintiffs further state that said games are operated or played upon an inclined board approximately two feet in width by approximately four feet in length, which said board is covered by a glass surface; that at various points on said board there are openings, plastic bumpers and metal pins, on and under which are printed numerals from 1000 to 100,000; that on the lighted back glass are printed scores from 10,000 to 9,000,000; that to operate said game the player inserts a 5¢ piece in a flat metal slide or into a drop shoot which protrudes from the end of said game; that said player then pushes said metal slide into the interior of said game; that there is thereby automatically released and ready for consecutive play on said board a given number

of marbles or balls, depending upon the location where said games are played.

Plaintiffs further state that by pushing a plunger inward or by manually pushing a marble or ball, one marble or ball at a time is projected upward and into a slot immediately in front of said plunger; that the player thereupon pulls said plunger back and releases it; that said plunger then propels the marble or ball forward up the incline into the field of play; that said marble or ball strikes various pins or bumpers, or flippers, and rolls downward and falls into one of the various openings.

Plaintiffs further state that each player receives identically the same number of marbles or balls from said machine for each 5¢ inserted therein; that each player endeavors to make as high a score as possible; that no merchandise, checks, tokens or any other objects whatsoever are released by said game; that said game does not give any return or free-play or plays; that upon playing said game each player receives in return for his money amusement only; and that in playing said game the success of each player depends solely upon his or her individual skill.

Plaintiffs further state that each of said games carries a rectangular label on the bottom of the surface of said board, which said label reads as follows:

"To Patrons

You must be 18 years old to play this machine. Play for amusement only. No prizes, tokens or free plays given or awarded."

Plaintiff farther states that the games hereinbefore mentioned are now or have heretofore been played under contract by and between said plaintiffs and various mer-

chants of said city of Columbus, Ohio; that under said contracts said respective plaintiffs and said merchants receive a division of the profits accruing from the operation of said games; and that said plaintiffs propose to make new contracts with other merchants to install said games in other locations in said city.

Plaintiffs further state that on or about the sixth day of December, 1954, the council of said city passed ordinance No. 1615-54, which said ordinance was approved by M. E. Sensenbrenner as mayor of said city, on the seventh day of December, 1954; that a true copy of said ordinance is hereto attached, marked Exhibit "A" and made a part hereof; that by Section 2 of said ordinance the same was declared to be an emergency measure for the reasons stated in the preamble thereof and accordingly took effect and has been in force from and since its passage and approval by said mayor; that prior to the passage of said ordinance said council of said city was fully aware that the plaintiffs had a vital interest in said legislation but that the same was passed by said council without notice to the plaintiffs or any of them and without giving them or any of them an opportunity to be heard.

Plaintiffs further state that the preamble to said ordinance declares that the operation of pin-ball machines involving skill encourages gaming and the general disorder incident thereto and is a threat or menace to the peace and morals of the community; that said games operated by said plaintiffs involve skill on the part of the player but do not involve chance or reward; that said games do not encourage or tend to encourage gaming or any general disorder which might be incident thereto and are not a threat or menace to the peace and morals of the community; that

said preamble also declares that pin-ball machines, which are played only for amusement, are so constructed as to be almost identical in appearance and operation with certain gambling devices per se; that the games operated by said plaintiffs are not gambling devices per se and are not so constructed as to be almost identical in appearance and operation with gambling devices per se; that said preamble also recites that the vast majority of amusement devices are readily convertible to gambling devices; that said games operated by said plaintiffs are not readily convertible to gambling devices; that said preamble also recites that the operation of pin-ball machines which are played only for amusement has become and now constitutes a nuisance in that it encourages a false sense of values, idling, and loitering; that the said games operated by said plaintiffs have not become and do not now constitute a nuisance and do not encourage a false sense of values, idling and loitering; that while said preamble declares that the passage of said ordinance as an emergency measure was necessary for the immediate preservation of the public peace and safety, the games operated by said plaintiffs in no wise or manner affect the public peace and safety; and that by reason of the declaration and provisions contained in said ordinance, the same is arbitrary, unreasonable and is accordingly, invalid.

Plaintiffs further state that said respective games are not now in operation because of the threats of the defendants to seize, confiscate and destroy them; that if said plaintiffs attempt to carry out said contracts with said merchants and operate said games said defendants will seize said games, confiscate them and arrest and imprison said plaintiffs as well as said merchants; that said mer-

chants have been placed in fear by said threats and because thereof said plaintiffs have been compelled to remove said games from the premises of said merchants—all in violation and impairment of the obligations of said plaintiffs and said merchants under said contracts, as well as in contravention of Article I, Section 1, of the Constitution of the state of Ohio, and Article 1, Section 10 of the Constitution of the United States.

Plaintiffs further state that the valuable property and property rights hereinbefore set forth have been built up by said plaintiffs over a period of years through licensing and encouragement by said defendants; that said defendants have thereby recognized that the ownership and operation of said games is a lawful and legitimate business; that said games are not and have not been used for gambling; that in passing said ordinance the council of said city is now attempting to deprive these plaintiffs of said property and property rights as well as the right to carry on a lawful and legitimate business, without due process of law and in contravention of Article I, Sections 1 and 16 of the Constitution of the state of Ohio, and the 14th Amendment to the Constitution of the United States.

Plaintiffs further state that said defendants are threatening to arrest and prosecute said plaintiffs and said merchants under said ordinance and seize, confiscate and destroy said games because said ordinance prohibits the possession, custody or control of any table game or device commonly known as a "pin-game", a "pin-ball game" or a "marble game", the operation, use or play of which is controlled by placing therein any coin, plate, disk, plug, key or other token, or by the payment of a fee; that there are many table games or devices the use, play or operation of

which is controlled by placing therein a coin, plate, disk, plug, key or other token or by the payment of a fee, but that the ownership, custody, control or operation of said games or devices are not prohibited by said ordinance; that while the preamble to said ordinance declares that the operation of machines similar to pin-ball machines involving chance or skill or reward, also encourage gaming or the general disorder incident thereto, and is a threat or menace to the peace and morals of the community, said ordinance does not enumerate such machines or prohibit their operation; that the preamble to said ordinance also places machines involving skill in the same class with those involving chance or reward; that while the pin-games operated by said plaintiffs do not constitute a nuisance and do not encourage a false sense of values, idling or loitering, there are other games or places the operation of which are not prohibited by said ordinance but which do encourage a false sense of values, idling, and loitering; that said discrimination in the terms of said ordinance as well as in the enforcement thereof by said defendants amounts to a denial to the plaintiffs of the equal protection of the law within the meaning of Article I, Section 1 of the Constitution of the state of Ohio, and of the 14th Amendment to the Constitution of the United States.

Plaintiffs further state that the enactment of said ordinance by said council, in so far as it would deprive the plaintiffs of the right of ownership, possession, custody, control and operation of said games, constitutes an unreasonable exercise of the police power of said city in that said ordinance bears no relation whatsoever to the public safety, public health or public morals of said city.

Plaintiffs further state that said ordinance, in so far as it would deprive said plaintiffs of the right to own, possess, control and operate said games, is also invalid because it is in conflict with Secs. 2915.01 to 2915.17, inclusive, and 715.51, Revised Code of Ohio, in that said ordinance forbids that which said statutes permit.

Plaintiffs further state that the passage of said ordinance and the seizure, confiscation and destruction of said games thereunder will result in an irreparable loss to each of said plaintiffs; that said passage, seizure, confiscation and destruction will result in a multiplicity of suits; and that by reason of the facts herein set forth said plaintiffs are without an adequate remedy at law.

Wherefore, plaintiffs pray that—

1. The court may enter a judgment finding and declaring:

(a) That said ordinance, in so far as it would deprive the plaintiff of the right to own, possess, have custody of, control and operate said games, is unconstitutional and void;

(b) That the ownership, possession, custody, control and operation of said games by said plaintiffs and/or said merchants are lawful within the meaning of the statutes of the state of Ohio;

2. Said defendants and each of them may be temporarily restrained—

(a) From interfering with the ownership, possession, custody, control and operation of said games by said plaintiffs;

(b) From interfering with or molesting any merchant with whom said plaintiffs have either heretofore had or may now or hereafter have contracts for the operation of said games;

3. That said injunction or injunctions may be made permanent.

4. Said plaintiffs may have all other and further relief to which they may be entitled in the premises.

OWEN B. SHERWOOD,
McLESKEY & McLESKEY,
Attorneys for Plaintiffs.

[Duly verified.]

AMENDED JOINT ANSWER OF DEFENDANTS.

[Filed April 4, 1955.]

Now come the defendants and each of them and for their amended joint answer to the petition herein admit: that the defendant, the City of Columbus, is a municipal corporation organized under the laws of the state of Ohio; that defendant, Leo L. Phillips, is the director of the department of public safety of said city; that the defendant, George Scholer, is the chief of the division of police of the department of public safety of said city; and that as such said defendants are charged with the direction and enforcement of all safety ordinances of said city.

Further answering, defendants admit that on or about the sixth day of December, 1954, the council of the city passed Ordinance No. 1615-54, which said ordinance was approved by M. E. Sensenbrenner as mayor of said city, on the seventh day of December, 1954; and that a true copy of said ordinance is attached to plaintiffs' petition, marked Exhibit "A" and made a part thereof.

First Defense:

For further answer to the petition and for their first defense, defendants allege that on or about the ninth day

of March, 1953, the council of the city of Columbus passed Ordinances Nos. 156-53 and No. 157-53, which said respective ordinances were approved by Robert T. Oestreicher as mayor of said city, on the tenth day of March, 1953; that each of said ordinances became effective on the tenth day of April, 1953, and remain effective as of this date; and that true copies of said respective ordinances are attached hereto, marked Exhibits "A" and "B" and made a part hereof.

Second Defense:

For further answer to the petition of the plaintiffs herein and for their second defense, the defendants and each of them deny each and every allegation in said petition contained not specifically herein admitted to be true.

CHALMERS P. WYLIE,
City Attorney,
RUSSELL LEACH,
Senior Assistant City Attorney.

[Duly verified.]

JOINT REPLY OF PLAINTIFFS.

[Filed June 25, 1955.]

Now come the plaintiffs and each of them and for their joint reply to the first defense of the amended joint answer filed herein admit each and every allegation therein contained.

By way of further reply plaintiffs further state—

1. That under and by virtue of said ordinances said defendants are now threatening to seize said games owned by said plaintiffs as aforesaid, to confiscate them and to arrest and imprison the merchants with whom said plain-

tiffs have said contracts; that said merchants have been placed in fear by said threats and propose to remove said games from their respective premises—all in violation and impairment of the obligations of said plaintiffs and said merchants under said contracts, as well as in contravention of Article I, Section 1, of the Constitution of the state of Ohio and Article I, Section 10 of the Constitution of the United States.

2. That the valuable property and property rights heretofore set forth have been built up by said plaintiffs over a period of years through licensing and encouragement by said defendants; that said defendants have thereby recognized that the ownership and operation of said games is a lawful and legitimate business; that said ordinances authorize the seizure and confiscation of these games without proof of gambling; that there is no evil inherent in said games; that they do not work an injury to the public; that in passing said ordinances the council of said city is now attempting to deprive these plaintiffs of said property and property rights, as well as the right to carry on a lawful and legitimate business, without due process of law and in contravention of Article I, Sections 1 and 16 of the Constitution of the state of Ohio, and the 14th Amendment to the Constitution of the United States.

3. That the phrase "which in no way tends to encourage gambling" contained in Section 1 of said Ordinance No. 156.53, which is a part of Section 35.28 of the 1952 Code of said city of Columbus, Ohio, and the phrase "which tends to encourage gambling" contained in Section 2 of said ordinance, which is a part of Section 35.30 of said Code, and the phrase "which tends in any way to encourage gambling" contained in Section 3 of said ordinance, which

is a part of Section 35.33 of said Code, and the phrase "which tends to encourage gambling" contained in Section 1 of Ordinance No. 157.53, which as a part of Section 29.38 of said Code, are so vague, indefinite and uncertain as to constitute a denial of due process of law within the meaning of Article I, Section 16 of the Constitution of the state of Ohio, and of the 14th Amendment to the Constitution of the United States.

4. That the phrase "which is adapted, or may readily be converted into such machine, device, or instrument" contained in Section 1 of said Ordinance No. 157.53, which is a part of Section 29.38 of said Code and the phrase "any device easily convertible to automatic payoff or free play by slight changes in, or addition to the mechanical structure" contained in Section 3 of said ordinance which is a part of Section 29.42 of said Code, are so vague, indefinite and uncertain as to constitute a denial of due process of law within the meaning of Article I, Section 16 of the Constitution of the state of Ohio, and of the 14th Amendment to the Constitution of the United States.

5. That said defendants are also threatening to seize said games so owned and operated by said plaintiffs because said Sections 1 and 6 of said Ordinance No. 157.53 which are parts of Sections 29.38 and 29.42-2, respectively, of said Code, prohibits the operation of any game which registers a score as a result of such operation; that there are many machines, devices or instruments which register scores as a result of their operation, which said defendants have indicated they do not intend to seize; that all competitive games and sports ordinarily register scores as a result of their play but that said defendants have indicated they do not intend to seize and confiscate any of them except the

games owned by these plaintiffs; that said discrimination on the part of said defendants is not only arbitrary, unreasonable and capricious but amounts to a denial to the plaintiffs of the equal protection of the law within the meaning of Article I, Section 1 of the Constitution of the state of Ohio, and of the 14th Amendment to the Constitution of the United States.

6. That the enactment of said ordinances by said council, in so far as they would deprive the plaintiffs of the right to own and operate said games, constitutes an unreasonable exercise of the police power of said city in that said ordinances bear no relation whatsoever to the public safety, public health or public morals of said city.

7. That said Section 3 of said Ordinance No. 156.53, which is a part of Section 35.33 of said Code provides, among other things that the city auditor of said city shall not issue a license or registration for any game which tends in any way to encourage gambling and which in any manner is violative of the Code of said city; and that said section of said ordinance attempts to confer judicial power upon said city auditor in that it sets up no standards by which said city auditor shall be guided in determining whether or not such license should be issued but leaves said determination to the sole discretion of said auditor in contravention of Article IV, Section 1 of the Constitution of the state of Ohio, and Article 3, Section 1 of the Constitution of the United States.

8. That Section 1 of said Ordinance No. 157.53, which is a part of Section 29.38 of said Code, provides that every game so exhibited or permitted to be operated shall be subject to seizure by any police officer of said city; and that said section of said ordinance attempts to confer judicial

power upon any police officer of said city in that it sets up no standards by which said police officer shall be guided in determining whether or not said game tends to encourage gambling or should be seized, but leaves said determination to the sole discretion of said police officer in contravention of Article IV, Section 1 of the Constitution of the state of Ohio, and Article 3, Section 1 of the Constitution of the United States.

9. That said ordinances, in so far as they would deprive said plaintiffs of the right to own and operate said games, are also invalid because they are in conflict with Sections 2915.01 to 2915.17, inclusive, and 715.51, Revised Code of Ohio, in that said ordinances forbid that which said statutes permit and direct that which said statutes prohibit.

10. That the police power granted to municipalities under Section 3, Article XVIII of the Constitution of the state of Ohio includes the power to regulate but does not include the power to prohibit unless the object of such legislative regulation is an inherently evil occupation, trade or business; that the operation of said games is not an inherently evil occupation, trade or business and that by reason thereof the defendants are without power under said ordinances to prohibit the operation of said games.

11. That the Ordinances Nos. 156-53 and 157-53 became effective on the tenth day of April, 1953; that by their express terms they are not directed solely at pin games but rather at all devices "which tend to encourage gambling"; that Ordinance No. 1615-54 became effective on the seventeenth day of December, 1954, is directed solely at pin games and prohibits their ownership, possession, custody, control or operation; that by reason of the facts herein set forth Ordinances Nos. 156-53 and 157-53, if constitutional,

which plaintiffs deny, have, so far as this action is concerned, been superseded by Ordinance No. 1615-54 and that if said Ordinance No. 1615-54 is constitutional, which plaintiffs also deny, the rights of the parties herein are controlled by said Ordinance No. 1615-54 and not by said Ordinances Nos. 156-53 and 157-53.

Wherefore, plaintiffs renew the prayer of their petition.

OWEN B. SHERWOOD,
McLESKEY & McLESKEY,
Attorneys for Plaintiffs.

[Duly verified.]

TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES

1955, March 8. Petition and precipe filed.

1955, March 8. Motion and memorandum filed.

1955, March 8. Notice of hearing 3-11-55; 10:30 a. m. filed.

1955, March 8. Summons issued sheriff of Franklin county; return 3-21-55; answer 4-9-55.

1955, March 17. Opinion of Judge Gessaman filed.

1955, March 21. Temporary restraining order issued against defendants; plaintiff to give $100.00 bond, as per entry.

1955, March 24. Joint answer of defendants filed.

1955, March 24. Application to advance and memo filed.

1955, April 1. Motion and memo of plaintiffs filed.

1955, April 4. Motion of plaintiff sustained; leave to file amended joint answer, as per entry.

1955, April 4. Amended joint answer of defendants filed.

1955, April 15. Demurrer and memo of plaintiff filed.

1955, May 6. Memo contra demurrer of plaintiffs filed.

1955, May 14. Reply memo of plaintiffs filed.

1955, June 4. Opinion of Judge Gessaman filed.

1955, June 14. Demurrer of plaintiffs overruled; exceptions reserved to plaintiffs; leave to plaintiffs to file reply, as per entry.

1955, June 25. Joint reply of plaintiffs filed.

1955, November 17. Armstrong & Okey certificate filed. $12.00.

1955, December 13. Memo of plaintiff filed.

1956, May 9. Decision filed by Judge Reynolds.

1956, June 15. Notice of appeal filed. Said appeal on questions of law and fact.

1956, June 22. Precipe for transcript of docket and journal entries to Court of Appeals filed.

March 21, 1955. This day this cause came on to be heard upon the application of the plaintiffs for a temporary restraining order against the defendants as prayed for in the petition, was argued by counsel and submitted to the court. On consideration thereof, the court orders, adjudges and decrees that a temporary restraining order against the defendants be and the same is hereby allowed, against the enforcement of Ordinance No. 1615-54 passed by the council of the city of Columbus, Ohio, on the sixth day of December, 1954, and approved by M. E. Sensenbrenner, as mayor of said city, on the seventh day of December, 1954, so long as the pin games described in said petition are played for the purpose of amusement only, and so long as the players thereof do not win or receive, directly or indirectly, any merchandise, cash, checks, tokens, free plays or anything of value as a prize or reward for playing any of said pin games. In the event that any of said pin games are played as gambling devices, i.e., in the event that any merchandise, cash, token, free plays, checks or anything of value is won or received, directly or indirectly, by the player as a prize or reward for playing any of said pin

games described in the petition, or played as gambling devices in any way, or in the event any said pin game when delivered to a merchant shall not carry thereon a rectangular label on the face of the board of said game, and visible to the person playing or about to play said game reading as follows:

"To Patrons

You must be 18 years old to play this machine. Play for amusement only. No prizes, tokens or free plays given or awarded.",

the defendants shall be permitted to seize them whenever they are so played and to destroy and to enforce the proper law or ordinance and to destroy them in accordance with law.

Plaintiffs shall give bond in the sum of $100.00.

April 4, 1955. This cause came on to be heard upon the motion of plaintiffs for an order requiring the defendants to separately state and number their defenses in the joint answer of the defendants herein. It appearing to the court that defendants affirmatively request the sustaining of said motion, the court, therefore, orders, adjudges and decrees that plaintiffs' motion be and the same is hereby sustained. Leave is granted to file an amended joint answer within rule.

June 14, 1955. This cause came on to be heard upon the demurrer of plaintiffs to the first defense of the amended joint answer, and was submitted to the court on the pleadings and briefs of counsel.

In consideration whereof, the court finds the demurrer not to be well taken and the same is overruled.

Plaintiffs are given leave to file their reply within rule.

Exceptions reserved to plaintiffs.

[Duly certified.]

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO.

RAY M. BENJAMIN, ET AL.,
Plaintiff,

vs.

THE CITY OF COLUMBUS, ET AL.,
Defendant.

TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES.

1956, June 22. Transcript of docket, journal entries, and all original papers, to wit: 29 in all filed.

1956, October 1. Bill of exceptions filed.

1956, October 13. Stipulation filed.

1956, October 13. Proffer of testimony filed.

1956, November 9. (3) Brief of plaintiff-appellee filed.

1956, November 9. Indication of service filed.

1956, December 10. (3) Brief of defendant-appellants filed.

1956, December 10. Proof of service filed.

1956, December 21. Reply brief on behalf of plaintiffs-appellees filed.

1957, February 7. Opinion filed. Judgment for defendant.

1957, March 18. Judgment for defendant, as per entry.

1957, March 18. Mandate issued.

1957, March 19. Bond filed.

1957, March 22. Notice of filing bill of exceptions filed.

1957, April 2. Notice of appeal filed. (Constitutional question.)

1957, April 2. Precipe for transcript filed.

1957, April 2. Proof of service on notice of appeal filed.

March 18, 1957. The parties having stipulated (1) that the above entitled cause be joined with Cause No. 5530 for the submission of evidence, and (2) that the transcript of the proceedings in the Court of Common Pleas, and the stipulations therein contained, together with the proffer of testimony filed in this court on the thirteenth day of October, 1956, should constitute the evidence before this court in each of said causes, the above entitled appeal on questions of law and fact came on to be heard, together with said Cause No. 5530, was argued by counsel and submitted to the court.

Upon consideration whereof, the court being fully advised in the premises, finds and declares from the evidence adduced that Ordinances Nos. 156-53, 157-53, and 1615-54, enacted by the council of the city of Columbus, Ohio, and each of them, are not in contravention of either Article I, Sections 1 and 16, nor of Article III, Section 1 of, or the 14th Amendment to the Constitution of the United States, nor in contravention of any other article or section of or amendment to either of said Constitutions and that said plaintiff are accordingly not entitled to an injunction restraining the enforcement of said ordinances or either of them.

It is, therefore, ordered, adjudged and decreed that the temporary restraining order heretofore issued in the above entitled cause be and the same is hereby dissolved; that the petition be and the same is hereby dismissd at plaintiffs' costs; that judgment in said cause be, and the same is, hereby rendered for the defendants for costs; and that

said cause be and the same is hereby remanded to the Common Pleas Court for execution for costs.

To all of which rulings, orders, decrees and judgments of the court said plaintiffs, and each of them, except.

Plaintiffs having advised the court that they desire to appeal said cause on questions of law to the Supreme Court of Ohio, it is, therefore, ordered, adjudged and decreed that pending the determination of said appeal the execution of the judgment heretofore rendered herein by this court be and the same is hereby stayed upon the following *conditions, to-wit:*

1. That the plaintiffs shall abide by and perform the orders and judgments of said Supreme Court of Ohio.

2. That said plaintiffs will pay all money, costs and damages which may be recovered or awarded against them by said Supreme Court upon the final determination of said appeal; and

3. That said plaintiffs give bond to the satisfaction of the clerk of this court in the sum of $50.00.

[Duly certified.]

IN THE COMMON PLEAS COURT OF FRANKLIN COUNTY, OHIO.

G. D. FERGUSON, RAY M. BENJAMIN, EMIL WINDmiller, Wally Chapin, Guy Oddi, Jack D. Smith, Boris H. Siegel, Laurence Shankman, Michael Charie, and Kenneth P. Kelsey,

Plaintiffs,

vs.

THE CITY OF COLUMBUS, A MUNICIPAL CORPORAtion Organized Under the Laws of the State of Ohio, Donald D. Cook, as Director of the Department of Public Safety of the City of Columbus, Ohio, and Frank L. Harrison, as Chief of the Division of Police of the Department of Public Safety of the City of Columbus, Ohio,

Defendants.

PETITION.

[Filed March 26, 1953.]

Plaintiffs state that they and each of them are engaged, among other things, in the business of owning and operating amusement games in the city of Columbus, county of Franklin, and state of Ohio; that they have a common interest in the subject of this action and in the relief demanded; that the defendant, the City of Columbus, is a municipal corporation organized under the laws of the state of Ohio; that the defendant, Donald D. Cook, is the director of the department of public safety of said city; that the defendant, Frank L. Harrison, is the chief of the

division of police of the department of public safety of said city; that as such said defendants are charged with the direction and enforcement of all safety ordinances of said city; and that plaintiffs bring this action on behalf of themselves, as well as on behalf of all other citizens and residents of said city who may be similarly interested.

Plaintiffs further state that each of them has owned and operated in said city of Columbus, Ohio, the following number of amusement games generally designated as "pin games", for the following periods of time, the equipment used in said games having the following values, to-wit:

Name	Length of Operation	Number of Games	Value of Games
G. D. Ferguson	7 years	20	$10,000
Ray Benjamin	5 years	75	26,000
Emil Windmiller	17 years	100	40,000
Wally Chapin	15 years	25	8,000
Guy Oddi	10 years	100	30,000
Jack D. Smith	7 years	30	10,000
Boris H. Siegel	5 years	30	10,000
Laurence Shankman	5 years	30	10,000
Michael Charie	16 years	100	40,000
Kenneth P. Kelsey	13 years	30	15,000

Plaintiffs further state that said games are operated or played upon an inclined board approximately two feet in width by approximately four feet in length, which said board is covered by a glass surface; that at various points on said board there are openings, plastic bumpers and metal pins, on and under which are printed numerals from 1000 up to 100,000; that on the lighted back glass are printed scores from 10,000 to 9,000,000; that to operate said game

the player inserts a 5¢ piece in a flat metal slide or into a drop shoot which protrudes from the end of said game; that said player then pushes said metal slide into the interior of said game; that there is thereby automatically released and ready for consecutive play on said board a given number of marbles or balls, depending upon the location where said games are played.

Plaintiffs further state that by pushing a plunger inward or by manually pushing a puck or ball, as in bowling games, one marble or ball at a time is projected upward and into a slot immediately in front of said plunger; that the player thereupon pulls said plunger back and releases it; that said plunger then propels the marble or ball forward up the incline into the field of play and that said marble or ball strikes various pins or bumpers, or flippers, and rolls downward and falls into one of the various openings.

Plaintiffs further state that each player receives identically the same number of marbles or balls or pucks from said machine for each 5¢ inserted therein; that he endeavors to make as high a score as possible; that no merchandise, checks, tokens or any other objects whatsoever are released by said game; that said game does not give any return or free-play or plays; that upon playing said game the player receives in return for his money amusement only; that the games hereinbefore mentioned are now played under contract by and between said plaintiffs and various merchants of said city of Columbus, Ohio; that under said contracts said respective plaintiffs and said merchants receive a division of the profits accruing from the operation of said games; and that said plaintiffs pro-

pose to make new contracts with other merchants to install said games in other locations in said city.

Plaintiffs further state that on or about the ninth day of March, 1953, the council of said city passed Ordinances No. 156.53 and No. 157 53, which said respective ordinances were approved by Robert T. Oestreicher as mayor of said city, on the tenth day of March, 1953; that each of said ordinances will become effective on the tenth day of April, 1953; and that a true copy of said respective ordinances is hereto attached, marked Exhibits "A" and "B" and made a part hereof.

Plaintiffs further state that said games do not tend to encourage gambling and are not gambling devices within the meaning of said ordinances and that each of said machines carries a rectangular label on the bottom of the surface of said board, which said label reads as follows:

"To Patrons

You must be 18 years old to play this machine. Play for amusement only. No prizes, tokens or free plays given or awarded."

Plaintiffs further state that under and by virtue of said ordinances said defendants are now threatening to seize said games owned by said plaintiffs as aforesaid, to confiscate them and to arrest and imprison the merchants with whom said plaintiffs have said contracts; that said merchants have been placed in fear by said threats and propose to remove said games from their respective premis — all in violation and impairment of the obligations of . id plaintiffs and said merchants under said contracts, as well as in contravention of Article I, Section 1, of the Constitu-

tion of the state of Ohio and Article 1, Section 10 of the Constitution of the United States.

Plaintiffs further state that the valuable property and property rights hereinbefore set forth have been built up by said plaintiffs over a period of years through licensing and encouragement by said defendants; that said defendants have thereby recognized that the ownership and operation of said games is a lawful and legitimate business; that in passing said ordinances the council of said city is now attempting to deprive these plaintiffs of said property and property rights, as well as the right to carry on a lawful and legitimate business, without due process of law and in contravention of Article I, Sections 1 and 16 of the Constitution of the state of Ohio, and the 14th Amendment to the Constitution of the United States.

Plaintiffs further state that the phrase "which in no way tends to encourage gambling" contained in Section 1 of said Ordinance No. 156.53, which is a part of Section 35.28 of the 1952 Code of said city of Columbus, Ohio, and the phrase "which tends to encourage gambling" contained in Section 2 of said ordinance which is a part of Section 35.30 of said Code, and the phrase "which tends in any way to encourage gambling" contained in Section 3 of said ordinance, which is a part of Section 35.33 of said Code, and the phrase "which tends to encourage gambling" contained in Section 1 of Ordinance No. 157.53, which is a part of Section 29.38 of said Code, are so vague, indefinite and uncertain as to constitute a denial of due process of law within the meaning of Article I, Section 16 of the Constitution of the state of Ohio, and of the 14th Amendment to the Constitution of the United States.

Plaintiffs further state that the phrase "which is adapted, or may readily be converted into such machine, device, or instrument" contained in Section 1 of said Ordinance No. 157.33, which is a part of Section 29.38 of said Code and the phrase "any device easily convertible to automatic payoff or free play by slight changes in, or adition to the mechanical structure" contained in Section 3 of said ordinance which is a part of Section 29.42 of said Code, are so vague, indefinite and uncertain as to constitute a denial of due process of law within the meaning of Article I, Section 16 of the Constitution of the state of Ohio, and of the 14th Amendment to the Constitution of the United States.

Plaintiffs further state that said defendants are also threatening to seize said games so owned and operated by said plaintiffs because said Sections 1 and 6 of said Ordinance No. 157.53 which are parts of Sections 29.38 and 29.42 2, respectively, of said Code, prohibits the operation of any game which registers a score as a result of such operation; that there are many machines, devices or instruments which register scores as a result of their operation, which said defendants have indicated they do not intend to seize; that all competitive games and sports ordinarily register scores as a result of their play but that said defendants have indicated they do not intend to seize and confiscate any of them except the games owned by these plaintiffs; that said discrimination on the part of said defendants is not only arbitrary, unreasonable and capricious but amounts to a denial to the plaintiffs of the equal protection of the law within the meaning of Article I, Section 1 of the Constitution of the state of Ohio, and of the 14th Amendment to the Constitution of the United States.

Plaintiffs further state that the enactment of said ordinances by said council, in so far as they would deprive the plaintiffs of the right to own and operate said games, constitutes an unreasonable exercise of the police power of said city in that said ordinances bear no relation whatsoever to the public safety, public health or public morals of said city.

Plaintiffs further state that said Section 3 of said Ordinance No. 156.53, which is a part of Section 35.33 of said Code provides, among other things, that the city auditor of said city shall not issue a license or registration for any game which tends in any way to encourage gambling and which in any manner is violative of the Code of said city; and that said section of said ordinance attempts to confer judicial power upon said city auditor in that it sets up no standards by which said city auditor shall be guided in determining whether or not such license should be issued but leaves said determination to the sole discretion of said auditor in contravention of Article IV, Section 1 of the Constitution of the state of Ohio, and Article 3, Section 1 of the Constitution of the United States.

Plaintiffs further state that Section 1 of said Ordinance No. 157.53, which is a part of Section 29.38 of said Code, provides that every game so exhibited or permitted to be operated shall be subject to seizure by any police officer of said city; and that said section of said ordinance attempts to confer judicial power upon any police officer of said city in that it sets up no standards by which said police officer shall be guided in determining whether or not said game tends to encourage gambling or should be seized, but leaves said determination to the sole discretion of said police officer in contravention of Article IV, Section 1 of

the Constitution of the state of Ohio, and Article 3, Section 1 of the Constitution of the United States.

Plaintiffs further state that said ordinances, in so far as they would deprive said plaintiffs of the right to own and operate said games, are also invalid because they are in conflict with Sections 13054 to 13066-2, inclusive, of the General Code of Ohio, in that said ordinances forbid that which said statutes permit.

Plaintiffs further state that the passage of said ordinances and the seizure of said games thereunder will result in an irreparable loss to each of said plaintiffs; that said passage and seizure will result in a multiplicity of suits; and that by reason of the facts herein set forth said plaintiffs are without an adequate remedy at law.

Wherefore, plaintiffs pray that said defendants and each of them may be temporarily restrained from interfering with or molesting said plaintiffs or the merchants with whom said plaintiffs have entered into contracts for the operation of said games and from seizing said games; that upon the final hearing of this cause (1) said injunction may be made permanent, (2) said ordinances, in so far as they would deprive the plaintiffs of the right to own and operate said games, be declared invalid, unconstitutional and void, and (3) the court may find and declare that said games are lawful within the meaning of the statutes of Ohio; and that said plaintiffs may have all other and further relief to which they may be entitled in the premises.

OWEN B. SHERWOOD,
W. B. McLESKEY,
C. W. McLESKEY,
Attorneys for Plaintiffs.

[Duly verified.]

AMENDED JOINT ANSWER.

[Filed February 15, 1954.]

Now comes the defendants and each of them and for their joint answer to the petition herein admit:

(1) That plaintiffs and each of them are engaged, among other things, in the business of owning and operating amusement games in the city of Columbus, county of Franklin, and state of Ohio; that they have a common interest in the subject of this action and in the relief demanded; that the defendant, the City of Columbus, is a municipal corporation organized under the laws of the state of Ohio; that the defendant, George O. Doyle, is the director of the department of public safety of said city; that the defendant, Frank L. Harrison, is the chief of the division of police of the department of public safety of said city; and that as such defendants are charged with the direction and enforcement of all safety ordinances of said city.

(2) That plaintiffs have owned and operated in said city of Columbus, Ohio, the following number of amusement games generally designated as "pin games," for the following periods of time, the equipment used in said games having the following values, to-wit:

Name	Length of Operation	Number of Games	Value of Games
G. D. Ferguson	7 years	20	$10,000
Ray Benjamin	5 years	75	26,000
Emil Windhaitler	17 years	100	40,000
Wally Chapin	15 years	25	8,000
Guy Oddi	10 years	100	30,000
Jack D. Smith	7 years	30	10,000

Boris H. Siegel	5 years	30	10,000
Laurence Shankman	5 years	30	10,000
Michael Charie	16 years	100	40,000
Kenneth P. Kelsey	13 years	30	15,000

(3) That said games are operated or played upon an inclined board approximately two feet in width by approximately four feet in length, which said board is covered by a glass surface; that at various points on said board there are openings, plastic bumpers and metal pins, on and under which are printed numerals from 1000 up to 100,000; that on the lighted back glass are printed scores from 10,000 to 9,000,000; that to operate said game the player inserts a 5¢ piece in a flat metal slide or into a drop shoot which protrudes from the end of said game; that said player then pushes said metal slide into the interior of said game; that there is thereby automatically released and ready for consecutive play on said board a given number of marbles or balls, depending upon the location where the games are played.

(4) That by pushing a plunger inward or by manually pushing a puck or ball, one marble or ball at a time is projected upward and into a slot immediately in front of said plunger; that the player thereupon pulls said plunger back and releases it; that said plunger then propels the marble or ball forward up the incline into the field of play and that said marble or ball strikes various pins or bumpers or flippers, and rolls downward and falls into one of the various openings.

(5) That the games hereinbefore mentioned are now played under contract by and between said plaintiffs and various merchants of said city of Columbus, Ohio; that under said contracts said respective plaintiffs and said merchants receive a division of the profits accruing from

the operation of said games; and that said plaintiffs propose to make new contracts with other merchants to install said games in other locations in said city.

(6) That on or about the ninth day of March, 1953, the council of said city passed Ordinance No. 156-53, and No. 157-53, which said respective ordinances were approved by Robert T. Oestreicher as mayor of said city, on the tenth day of March, 1953; that each of said ordinances became effective on the tenth day of April, 1953; and that a true copy of said respective ordinances is attached to plaintiffs' petition, marked Exhibits "A" and "B" and made a part thereof.

(7) That defendants are now threatening to enforce the provisions of the ordinances against plaintiffs and merchants with whom plaintiffs have said contracts.

(8) That under former ordinances and for a period of years, defendants licensed the said machines of plaintiffs.

(9) That said defendants are also threatening to seize said games so owned and operated by said plaintiffs because said Sections 1 and 6 of said Ordinance No. 157-53, which are parts of Sections 29.38 and 29.42-2, respectively, of said Code, prohibit the operation of any game which registers a score as a result of such operation.

For further answer to the petition of the plaintiffs herein, the defendants and each of them deny each and every allegation in said petition contained not specifically herein admitted to be true.

CHALMERS P. WYLIE,
City Attorney.
J. RUSSELL LEACH,
Assistant City Attorney.
Attorneys for Defendants.

[Duly verified.]

MOTIONS.

[Filed February 25, 1954.]

I.

Defendants respectfully move the court for judgment in their favor on the pleadings filed herein for the reason that, upon statements in the pleadings, including the averments of the petition, and the admissions of the amended joint answer, these defendants are entitled by law to judgment in their favor upon the ground that the pleadings fail to show a cause of action for declaratory judgment, injunction or any other equitable relief.

II.

Defendants respectfully move the court that if motion I is sustained, then, and in that event, the restraining order heretofore granted be vacated and dissolved.

CHALMERS P. WYLIE,
City Attorney,
J. RUSSELL LEACH,
Assistant City Attorney.

TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES.

1953, March 26. Petition filed.

1953, March 26. Motion and memorandum filed.

1953, March 26. Temporary restraining order allowed; bond set at $100.00, as per entry.

1953, March 26. Bond filed in Book 22, page 102.

1953, March 26. Precipe filed. Summons issued sheriff of Franklin county; return April 6, 1953; answer April 25, 1953.

1953, March 26. Order with copy entry issued sheriff of Franklin county; return April 6, 1953.

1953, March 26. Order with copy entry issued sheriff of Franklin county; return April 6, 1953.

1953, March 26. Order with copy entry issued sheriff of Franklin county; return April 6, 1953.

1954, June 3. Joint answer filed.

1954, June 3. Answer filed instanter, as per entry.

1954, January 20. Motions and memo of city attorney filed.

1954, January 29. Memo vs. motions for judgment, etc., filed.

1954, February 4. Decision of Judge Harter filed.

1954, February 11. Motion of defendants overruled. Defendants except. Leave to defendants to file an amended joint answer on or before March 1, 1954, as per entry.

1954, February 15. Motion of George O. Doyle filed.

1954, February 15. Affidavit filed.

1954, February 15. Donald D. Cook dismissed as party defendant. George O. Doyle made party defendant, as per entry.

1954, February 15. Amended joint answer filed.

1954, February 25. Defendants' motion and memo filed.

1954, March 5. Memo vs. motions for judgment on pleading and dissolution of restraining order re-filed.

1954, March 5. Memo vs. second motion for judgment on pleadings, etc., filed.

1954, July 19. Opinion of Judge Harter filed.

1954, July 23. Judgment for defendants; injunction dissolved; exceptions. Plaintiffs costs, as per entry.

1954, July 23. Notice of appeal filed.

1954, July 23. Precipe for transcript of docket and journal entries to Court of Appeals filed.

1954, December 9. Judgment of the trial court be and the same hereby is reversed and remanded to the trial court for further proceedings according to law, as per entry.

1954, December 9. Mandate issued to Common Pleas Court.

1955, April 22. Application to advance and memo of City of Columbus filed.

1955, May 6. Memo against application filed by plaintiff.

1955, May 24. Reply memo in support of application to advance cause for hearing filed.

1955, June 4. Opinion of Judge Gessaman filed.

1955, June 14. Cause ordered advanced for trial. Exceptions reserved to plaintiffs, as per entry.

1955, June 28. This cause ordered consolidated with Cause 191975 and be tried together, as per entry.

1955, November 17. Armstrong & Okey certificate filed. $12.00.

1956, May 29. Defendants, and each of them be, and they are hereby permanently enjoined (a) from interfering under ordinance numbers 156-53, 157-53 and 1615-54 with the ownership, possession, custody, control and operation of said pin games by said plaintiffs and each of them, as well as (b) from under ordinance numbers 156-53, 157-53 and 1615-54, interfering with or molesting any merchant with whom said plaintiffs have either heretofore had, or may now or hereafter have, contracts for the operation of said games so long as said games are not used for gambling. Defendants pay costs. Defendants except, as per entry.

1956, June 15. Notice of appeal filed. Said appeal is on questions of law and fact.

1956, June 22. Precipe for transcript of docket and journal entries to Court of Appeals.

March 26, 1953. This day this cause came on to be heard upon the application of the plaintiff for a temporary restraining order against the defendants as prayed for in the petition; was argued by counsel and submitted to the court. On due consideration thereof, the court orders, adjudges and decrees that a temporary restraining order against the defendants be and the same is hereby allowed, as prayed for in the petition, so long as the pin games described in the petition are played for the purpose of amusement only, and so long as the players thereof do not win or receive, directly or indirectly, any merchandise, cash, checks, tokens, freeplays or anything of value as a prize or reward for playing any of said pin games. In the event that any of said pin games are played as gambling devices, i.e., in the event that any merchandise, cash, tokens, checks, freeplays or anything of value is won or received, directly or indirectly, by the player as a prize or reward for playing any of said pin games described in the petition, or played as gambling devices in any way, the defendants shall be permitted to seize them whenever they are so played and to destroy them in accordance with law.

Plaintiff shall give bond in the sum of $100.00.

June 3, 1953. For good cause shown and by the agreement of the parties the answer in the above styled cause of action is filed instanter.

February 11, 1954. This day this cause came on to be heard upon the motion of the defendants for judgment on the pleadings, and, in the event said motion should be sustained, for an order vacating and setting aside the temporary restraining order heretofore issued herein, was argued by counsel and submitted to the court.

Upon consideration whereof, the court being fully advised in the premises, finds that said motion for judgment on the pleadings is not well taken and, accordingly, overrules the same.

To which ruling, order and judgment of the court said defendants, and each of them, excepts. Defendants are hereby granted leave to file an amended joint answer on or before the first day of March, 1954.

February 15, 1954. This day this cause came on to be heard on the affidavit of George O. Doyle, and for good cause shown, the court finds that said George O. Doyle is the appoin' d and acting director of public safety of the city of Columbus, Ohio, and that Donald D. Cook no longer has an interest in this action.

It is therefore ordered by the court, that the said Donald D. Cook be and is hereby dismissed as a party to this action and that George O. Doyle, director of public safety of the city of Columbus, is hereby joined as a party defendant in the above styled action and subject to and amenable to such orders as the court has heretofore made, or may hereafter make.

July 23, 1954. This day this cause came on for hearing upon the motion of the defendants for judgment on the pleadings and the motion of the defendants for vacation and dissolution of the restraining order granted in the above styled case.

Upon consideration of the averments of the petition, the averments of the amended joint answer, the memorandum of defendants in support of the motions and the memorandum of the plaintiffs contra to the motions, the court finds that defendants' motion for judgment on the pleadings is well taken and should, therefore, be sustained and that

defendants' motion to vacate and dissolve the temporary restraining order heretofore granted in the above styled case is well taken and should, therefore, be sustained.

It is, therefore, ordered, adjudged and decreed that the motion of defendants for judgment on the pleadings be and hereby is sustained; that final judgment be and hereby is granted in favor of the defendants; and that the restraining order heretofore issued in this action be and hereby is vacated and dissolved and held for naught. To all of which the plaintiffs except. The costs in this action are assessed against the plaintiffs.

December 9, 1954. This day this cause came on to be heard upon an appeal on questions of law from the Common Pleas Court of Franklin county, and was submitted to this court upon the transcript of the docket and journal entries of the trial court, the assignments of error of the plaintiffs-appellants, as well as the briefs and arguments of counsel.

Upon consideration whereof, the court being fully advised in the premises, finds and holds that the trial court erred in:

(1) Sustaining the motion of the defendants-appellees for judgment on the pleadings;

(2) Dissolving the temporary restraining order theretofore issued by the court; and

(3) Entering final judgment in favor of defendants-appellees.

It is, therefore, ordered, adjudged and decreed, that the judgment of the trial court be and the same is hereby reversed and that this cause be and the same is hereby remanded to the trial court for further proceedings according to law.

To all of which rulings, orders and judgments of the court said defendants-appellees except.

June 14, 1955. This cause came on to be heard upon the motion of defendants to advance the cause for trial.

Upon consideration whereof, the court finds the motion to be well taken and the same is sustained. It is therefore ordered that the within cause be advanced for trial at the earliest convenient date, the same to be fixed by the assignment commissioner in accordance with the rules and practice of this court.

Exceptions reserved to plaintiffs.

June 28, 1955. It appearing to the court that Cause No. 191975 in which said cause Ray M. Benjamin et al., are plaintiffs and the City of Columbus, et al., are defendants, could have originally been joined with this cause; that the testimony in each case will be substantially the same; and that in order to save time and expense said causes ought to be joined;

It is, therefore ordered, adjudged and decreed, all parties consenting thereto, that said Cause No. 191975 be and the same is hereby consolidated with this cause and that they be tried together.

May 29, 1956. Cause No. 191975, having been, by order of this court, consolidated with this cause, said consolidated causes came on to be heard upon the pleadings, and the evidence, were argued by counsel and submitted to the court.

Upon consideration whereof, the court, being fully advised in the premises, finds that ordinance numbers 156-53, 157-53 and 1615-54 passed by the council of the city of Columbus, Ohio, and each of them are invalid, unconstitutional and void, insofar as they prohibit the ownership,

possession, custody, control and operation of pin games for amusement purposes only and that said plaintiffs are, accordingly, entitled to injunctive relief.

It is therefore ordered, adjudged and decreed that said defendants, and each of them be, and they are hereby permanently enjoined (a) from interfering under ordinance numbers 156-63, 157-53 and 1615-54 with the ownership, possession, custody, control and operation of said pin games by said plaintiffs and each of them, as well as (b) from under ordinance numbers 156-53, 157-53 and 1615-54, interfering with or molesting any merchant with whom said plaintiffs have either heretofore had, or may now or hereafter have, contracts for the operation of said games, so long as said games are not used for gambling in any manner or form whatsoever, and that said defendants pay the costs of these proceedings.

To all of which rulings, orders and judgments of the court said defendants, and each of them, except.

[Duly certified.]

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO.

G. D. FERGUSON, ET AL.,
Plaintiffs-Appellees,

vs.

THE CITY OF COLUMBUS, ET AL.,
Defendants-Appellants.

TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES.

1956, June 22. Transcript of docket, journal entries and original papers, to-wit: 55 in all filed.

1956, October 1. Bill of exceptions filed.

1956, October 13. Stipulation filed.

1956, October 13. Proffer of testimony filed.

1956, November 9. (3) Brief of plaintiff-appellee filed.

1956, November 9. Indication of service filed.

1956, December 10. (3) Briefs of defendants-appellants filed.

1956, December 10. Proof of service filed.

1956, December 21. Reply brief on behalf of plaintiff-appellees filed.

1957, February 7. Opinion filed; judgment for defendant.

1957, March 18. Judgment for defendant, as per entry.

1957, March 18. Mandate issued.

1957, March 19. Bond filed.

1957, March 22. Notice of filing bill of exceptions filed.

1957, April 2. Notice of appeal on a debatable constitutional question filed.

1957, April 2. Precipe filed for transcript.

1957, April 2. Proof of service on notice of appeal filed.

March 18, 1957. The parties having stipulated (1) that the above entitled cause be joined with Cause No. 5529 for the submission of evidence, and (2) that the transcript of the proceedings in the Court of Common Pleas, and the stipulations therein contained, together with the proffer of testimony filed in this court on the thirteenth day of October, 1956, should constitute the evidence before this court in each of said causes, the above entitled appeal on questions of law and fact came on to be heard, together with said Cause No. 5529, was argued by counsel and submitted to the court.

Upon consideration whereof, the court being fully advised in the premises, finds and declares from the evidence adduced that Ordinance Nos. 156-53, 157-53, and 1615-54, enacted by the council of the city of Columbus, Ohio, and each of them, are not in contravention of either Article I, Sections 1 and 16, nor of Article III, Section 1 of, or the 14th Amendment to the Constitution of the United States, nor in contravention of any other article or section of, or amendment to either of said constitutions and that said plaintiffs are accordingly not entitled to an injunction restraining the enforcement of said ordinances or either of them.

It is, therefore, ordered, adjudged and decreed that the temporary restraining order heretofore issued in the above entitled cause be and the same is hereby dissolved; that the petition be and the same is hereby dismissed at plaintiffs' costs; that judgment in said cause be, and the same is, hereby rendered for the defendant for costs; and that said cause be and the same is hereby remanded to the Common Pleas Court for execution for costs.

To all of which rulings, orders, decrees and judgments of the court said plaintiffs, and each of them, except.

Plaintiffs having advised the court that they desire to appeal said cause on questions of law to the Supreme Court of Ohio, it is, therefore, ordered, adjudged and decreed that pending the termination of said appeal, the execution of the judgment heretofore rendered herein by this court be and the same is hereby stayed upon the following conditions, to-wit:

1. That the plaintiffs shall abide by and perform the orders and judgments of said Supreme Court of Ohio.

2. That said plaintiffs will pay all money, costs, and damages which may be recovered or awarded against them by said Supreme Court upon the final determination of said appeal; and

3. That said plaintiffs give bond to the satisfaction of the clerk of this court in the sum of $50.00.

[Duly certified.]

BILL OF EXCEPTIONS.

[Filed ~~October 1, 1956.~~] March 22, 1957

Ray M. Benjamin, et al., Plaintiffs-Appellees, v. City of Columbus, et al., Defendants-Appellants.

G. D. Ferguson, et al., Plaintiffs-Appellees, v. City of Columbus, et al., Defendants-Appellants.

Be it remembered, that on the trial of the above entitled cause before Honorables Lehr Fess and Clyde L. Deeds of the Sixth District Court of Appeals and Oscar Hunsicker of the Ninth District Court of Appeals sitting by designation in the place of the Second District Court of Appeals, on the fifteenth day of October, 1957, the same being submitted on the record of the testimony adduced in the Common Pleas Court of Franklin County, Ohio, before Honorable Dana F. Reynolds, judge, the exhibits admitted therein, the arguments and briefs of counsel, as follows:

Afternoon Session, Tuesday, November 15, 1955.

The Court: You may proceed.

Mr. McLeskey: If Your Honor please, the first case is No. 187,169 involves two ordinances, Nos. 156.53 and 157.53; the second case involves a third ordinance, that originally involved a third ordinance, which is No. 1615.54.

Now, in the second case, which involves the 157's, that number is 187,169, and the case involving 1615.54 is No. 191,975.

In 191,975, by answer the city attorney pleaded the first two ordinances which are involved, originally involved in 187,169, and to that we filed a reply, which is substantially the allegations of our petition in 187,169.

Now, when we began to prepare for this trial, Mr. Leach, of the city attorney's office, suggested to us that he would like to go back to 187,169 and plead by way of amendment to his answer, Ordinance No. 1615.54; in other words, the city attorney simply wanted to have all three ordinances in each case. We agreed to that, if Your Honor please, and we agreed it might be done without any further pleading, and then we agreed that the allegations contained in the petition filed in the second case, 191,975, might be treated as a reply to the amended answer in 187,169.

In other words, just reversing what we have done in the second case.

Now, there are certain admissions in the answer contained in 187,169, which are not contained in 191,975. We have stipulated that those admissions may be treated as being a part of the answer in 191,975, without further pleading on the city attorney's part, and then we have made this all-inclusive stipulation that any evidence that may be admissible in either case shall be admissible in the other case, so that we won't be worried here, we decided what evidence is competent in what case, and so forth.

The Court: Then, in other words, any evidence in the one case may be considered in both cases?

Mr. McLeskey: Both cases. If Your Honor please, we prepared this stipulation in writing just so we might have it. Mr. Leach okayed it. With Your Honor's consent, I will give a copy to the stenographer so it may be put in the record.

The Court: All right.

Stipulation.

"It is stipulated and agreed by and between counsel for the plaintiffs and counsel for the defendants that Ordinance No. 1615-54 may be treated as having been pleaded in the answer filed in Cause No. 187,169 without amendment of said answer; that the allegations contained in the petition filed in Cause No. 191,975 may be treated as a reply in said Cause No. 187,169 without further pleading; that the admissions contained in the amended joint answer filed in Case No. 187,169 may also be treated as a part of the amended joint answer filed in Case No. 191,975 without further pleading; and that any evidence which may be competent in Case No. 187,169 shall likewise be competent in Case No. 191,975 and vice versa."

Mr. Leach: If the court please, in the case of 187,169, the original defendants were the City of Columbus, Donald D. Cook as director of public safety, and Frank H. Harrison, as chief of the division of police.

Some time ago the city, by way of motion, asked that George Doyle be substituted for Don Cook, and that was done, and I would like to move at this time, and I believe the plaintiffs would join with me in this motion, that Leo L. Phillips be substituted for George Doyle.

The Court: It is proper.

Mr. Leach: And George Scholer be substituted for Frank Harrison.

The Court: Yes, it is proper.

Mr. McLeskey: That is agreeable to us, if Your Honor please.

The Court: Very well.

Mr. McLeskey: Now, unless the court wants something further, we are ready to start taking testimony.

The Court: Let's go ahead.

Mr. McLeskey: Mr. Solomon, will you please take the stand?

And thereupon the plaintiffs, to maintain the issues on their part to be maintained, offered and introduced in testimony on their behalf, the following evidence, to-wit:

Woolf Solomon,

called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Examined by Mr. McLeskey:

Q. You may state your name to the court. A. My name is Woolf Solomon.

Q. Where do you live, Mr. Solomon? A. In the city of Columbus, 501 Napoleon.

Q. And how long have you lived in the city of Columbus? A. 15 years.

Q. And what is your business, if any? A. I am a manufacturer's agent and distributor for coin operated machines in the city of Columbus.

Q. And how long have you been such a manufacturer's agent and distributor? A. For 15 years, in the city of Columbus.

Q. Is your business confined to the city of Columbus or the state of Ohio or does it extend beyond state lines? A. I am engaged in both interstate and intrastate commerce.

Q. In the sale and distribution of these machines? A. Coin-operated machines, yes, sir.

Q. Mr. Solomon, I am going to ask the court to mark as Plaintiff's Exhibit A what is described here as an "All Star Basketball Game," and I wish you would pull this game up.

The Court: Well, now, we will just consider that marked, and then they can do it at a later time.

Q. Yes. Will you tell us what that machine is? A. That is known in the trade as a pinball machine.

Q. As a pinball machine. Are you familiar with the operation of that machine? A. To a certain extent.

Q. Will you please demonstrate the machine for the court; show the court how it works, and as the demonstration proceeds, tell us what you are doing, so that we may get it into the record. A. Yes, I can demonstrate it.

Mr. McLeskey: Does the court want to—

The Court: I had better say maybe Ralph can go to the end of that table.

Mr. McLeskey: I think so, where you can hear.

The Court: Or else pull the machine up close.

Mr. McLeskey: We have to have a plug somewhere.

Q. Now, will you come up around here, Mr. Woolf? A. Mr. Solomon.

Q. Mr. Solomon. Pardon me. First of all, will you describe the machine to the court, and then tell how it operates, and then proceed to operate and describe as you operate it? A. This machine is known as a pinball machine, they are manufactured in Chicago by D. Gottlieb Company. This is an ordinary pinball machine, and there is nothing different about this than most pinball machines that are made today.

Now, by the insertion of a nickel, this machine will give you five balls to play with.

Q. Now, point out where the nickel is inserted. A. The nickel is inserted in a coin chute here.

Q. What part of the machine? A. In the coin drop chute.

Q. All right. A. Well, evidently it isn't working, or it isn't connected. Well, I don't believe that that is essential that the machine should even work; doesn't make any difference.

Mr. McLeskey: Let's see if it will work. If it don't you can describe it.

The Court: It evidently is not connected.

The Witness: Well, I can't demonstrate it unless it is opened.

Q. It is locked, is that the trouble? A. Yes, it is locked, and I can't demonstrate it unless it is open.

Q. Well, go ahead and tell us, Mr. Solomon. A. Well, as far as the operation of this piece of equipment here, it is that anybody could walk over to this machine, put a nickel in it and will receive five balls to play this machine.

Q. Is that the five balls that appear in the machine? A. That is the five balls, there is no more, no less. In the game, these balls can be shot out one at a time, and by the skill of the player there, depending it has gates on, it tells how far to pull the lever back, you can develop a certain amount of skill and develop a score on there, and that is all there is to it.

The Court: The score depends on where the ball stops or where it hits?

The Witness: Yes, and these people that play these machines, they shake it a little bit, they have flippers on the side where they kick the ball up by a certain amount of skill, coordination of hand and eye, they hit the bumpers there, and they derive a certain amount of amusement out of it, beside the skill on the machine.

Q. Have you in your business sold any of these machines for home use, Mr. Solomon? A. Yes, hundreds of them.

Q. Now, what is the fact as to whether on not any gambling machines have been manufactured since 1950, Mr. Solomon? A. Well, since 1950, at which time the National Government passed a law, called the Johnson Act, forbidding the manufacture of gambling devices and their shipment interstate, no manufacturer of coin-operated devices has manufactured a gambling machine.

Q. Offhand, do you recall the distinction which the Johnson Act makes between slot machines and amusement devices? A. In the bill of the Johnson Act, it specifically states that this bill and this law was not aimed at pinball machines, it specifically states that and exempts it in all categories.

Q. Do you remember in what classification that Act places pinball machines? A. Yes.

Mr. Leach: If the court please, I would like to object to this line of questioning.

Mr. McLeskey: It is just for the information of the court.

The court: It calls for a conclusion.

Q. Yes. The Act refers to slot machines and also to music devices and amusement devices, do you recall that? A. Yes, it does.

Q. And what class does the Act put amusement devices in, if you recall?

Mr. Leach: Objection.

Q. With slot machines or with music devices?

The Court: He may answer.

The Witness: I wish you would repeat that question.

Q. In what classification is amusement machines, in the classification with slot machines or in the classification with music devices? A. Well, it was specifically stated in

this Act that the pinball machine was an amusement device.

Q. Amusement device, all right. Now, Mr. Solomon, under this machine, does one person receive a larger number of balls for a nickel he puts in than any other person? A. Well, the way this machine is constructed, and all of them are constructed, no one can receive more than one person playing this machine. In other words, when an individual plays this particular piece of equipment or any piece of equipment of a similar type, he will receive exactly what is on the top there, which is five balls. All games today are five-ball machines.

Q. What is the function of the score? Tell us how the score operates on this machine. A. Well, the score is developed by a series of bumps and hits against bumpers electrically operated with various controls, electrical controls in the machine.

The Court: And then they are totaled?

The Witness: And then they are totaled, and they are totaled on a totaling device in the machine.

Q. Is that a simple contrivance from a mechanical point of view? A. It is far from simple.

Q. It is far from simple. Now, what is the purpose of this game; wherein comes the amusement? A. Well, it is a question that has been debated about the type of amusement a person likes.

Q. Is it competitive? A. Yes, it is competitive. It is not only competitive, but also gives the individual a certain amount of amusement.

Q. What is the object of the game? What is the purpose of the game? A. Well, in any type of sport, there is always a tendency for a person to try to get a high score or to excel.

Q. If there are two people playing the game, is there competition between their scores? A. Yes.

Q. Now, does this machine or any machine like it release any merchanise? A. No.

Q. Or any checks? A. No.

Q. Or any tokens? A. No, sir.

Q. Does it give any free play, this particular machine? A. I don't know. I don't believe it does, this particular machine.

Q. Can you tell the court anything about the mechanism of this free play attachment, is it a complicated proposition? A. Very complicated.

Q. Easy to put on and take off? A. No, sir.

Q. Can you do it yourself after all your experience? A. No, sir, I cannot do it myself.

Q. If it is done in your shop, who does it? A. A trained mechanic.

Q. And how long will it take the average mechanic, let us say, first, to put on a free-play mechanism on a machine? A. I would say about five days.

Q. And to take it off: how serious is it to take the thing off the machine? A. Oh, I would say about three days.

Q. About three days? A. Yes.

Q. Now, what is the fact, Mr. Solomon, as to whether or not the laws devised in various states as to whether free play is allowed or disallowed?

Mr. Leach: Objection.

Q. Is that a fact?

The Court: I am not particularly interested in other states. What about Ohio?

Q. All right. Take Ohio, is free play allowed in Ohio?

Mr. Leach: I am going to object to that question.

The Witness: Many communities—

Q. Are there communities in which free play is not allowed? A. Yes.

Q. How do these machines come, with or without free play? A. It is optional.

Q. It is optional, so when you sell a machine you may sell it with or without it? A. That is true.

Q. Depending on where the machine is to be used, is that correct? A. That is right.

Q. Now, what does, Mr. Solomon, would you say from your experience, the player receive in exchange for his nickel on this machine? A. Nothing but amusement.

Q. Now, does the score depend upon the skill of the player or chance or what? A. There is an element of both.

Q. Which would you say is the predominant? A. Skill is the predominant thing in this type of game; in fact, in most games today, because all games today being manufactured the byword at the factory is for them to manufacture machines for player appeal only.

Q. And by "player appeal" you mean what, amusement or gambling? A. Amusement. They can't manufacture gambling devices.

Q. Is it possible to operate this machine as an amusement device at a profit? A. Yes, sir.

Q. And is it being done day by day? A. Yes, sir.

Q. From your experience, Mr. Solomon, in this business, would you say that a machine of this type tends to encourage gambling? A. It does not.

Q. Now, would you say that this machine, from your experience, is one that is maybe readily converted to a gambling device? A. It could not be converted.

Mr. Leach: If the court please, in a lot of these questions the word "gambling devices" has been used. That is a term that is very difficult of definition. I know what Mr. Solomon is referring to, but I am going to object.

The Court: Well, I do, too, but I don't think it is prejudicial.

The Witness: Basketball games—in fact, every sport is represented on a table today in some form or other.

Q. Let me ask you, now, getting away from the matter of table games, are there other games, Mr. Solomon, generally speaking, that register scores? What would you say of football or baseball or any of those games, they register a score? A. I just stated that every sport is represented on a table registers a score.

Q. Forget the tables for a moment. Does a football game register a score? A. Yes.

Q. And baseball? A. Yes.

Q. To your personal knowledge, is there gambling in connection with those games? A. Not to my personal knowledge, no.

Q. You have heard of it? A. Are you referring to gambling on the machine itself?

Q. No. I am talking about a football game between Iowa and Ohio state, for instance. A. I don't know personally, but I have heard of gambling, yes.

Q. All right. Now, Mr. Solomon, the machine has been unlocked by Mr. Windmiller. Will you just play the machine briefly and explain for the court exactly how it operates? A. After injecting a nickel into this machine here, you receive five balls in a trough. These balls are played out one at a time, like this. You will notice I just hit a bumper and the ball jumps.

Q. What are you doing over there with your hand on the right? A. I am manipulating with my hand here a set of flippers. If the ball gets in the vicinity there, the players who are alert can make their scores larger by manipulating this ball against the flipper there and get additional scores.

Q. Is that a matter of skill? A. Entirely of skill.

Q. Entirely of skill? A. Yes, sir, and it demands a lot of coordination between the hand and eye. Now, I am not very adept at this, there are better players than I, but that is the feature of the game, to develop a larger score.

Q. Now, this is Ball No. 2? A. Yes. This goes over a series of roll-overs and bumpers; at certain times you don't have any control over the ball, but as soon as it is in the playing field, you can control it. I just shot the third ball. The idea of this game is to put those lights out, the number of lights in a row, which gives you additional scores. Unless the ball is down in the center, you have no control over it.

Q. Now, you have shot the third ball, is that right? A. That is right. As I stated, now, there are more adept players than I am, and they can make these balls do tricks by the jiggling of the machine. Well, now, I committed a foul, I shook the machine too hard, and the lights went out.

Q. But as you play, the score is registered on the board? A. That is right.

Q. And the game is to see who makes the highest score? A. There is a visiting team, home team score; it's a basketball game.

Q. It's a basketball game? A. Yes.

Q. Just one moment, now, Mr. Solomon. What happens when the next player starts to play? Now, you have played five balls. Tell us what the next man would do that

comes up to play it? A. Well, he would have to put a nickel in there and get five balls, too.

Q. And start off to play the game? A. Yes.

Q. And that continues, and that is all, that is the game? A. Yes, that is right.

Q. Anything that you would like to tell the court about this machine, Mr. Solomon, that you haven't told the court in response to my questions? A. Well, the only thing I can add to what I have said is that as a distributor of coin-operated machines, the manufacturers and the distributors of coin-operated devices throughout the country have actually bent every effort or bent every effort to their designers and their engineers to manufacture today nothing but amusement devices, and these amusement devices, it seems, have become very successful, much more successful than if there were pay-offs and gambling.

Q. You mean the amusement angle? A. Yes, games that bring in the most money in the coin-operated devices field in the past five years, have brought in more revenue than any gambling devices have ever made.

Q. I ask you if it was profitable to operate these machines? A. Yes.

Q. You said these machines cannot be operated unless you have free play, is that true? A. No, it isn't true. In fact, I believe it is more profitably operated.

Q. Mr. Solomon, it is not possible to take off this top, it's a complicated procedure, is it? A. Yes.

Q. Describe to the court what there is beneath it. This is just a part of it, the board, just a part of it? A. What you see on the top is very simple. Below that board, there is a series of coils, wires, relays and other electronic instru-

ments to measure and to relay the score as it measures from one point to another. It's a very complicated device.

Q. Do you get in the field of electronics? A. Yes. In fact, the Government has borrowed ideas from pinball machines to create new electronic devices.

Q. Mr. Solomon, we aren't going to offer it in evidence, back there in the corner of the room is another one of these games. What do you call that? A. That is a target gun.

Q. And what is the game in the target gun? A. By the insertion of a coin, the machine lights up, a target appears. This target can be shot at. Well, there are various guns of that type, some of them have rifles, some of them have pistols, they just take and aim this gun and shoot down at these targets. It's a highly developed skill game.

Q. Does it register a score also? A. Yes, it does; it totals the score, the number of targets you shoot down.

Q. Can two people play at that game? A. Well, in competition, yes. It does encourage competition.

The Court: But only one at a time?

The Witness: Only one at a time, yes. There are also guns that two can shoot at a time.

Q. In a game like these guns, does each player get the same number of balls? A. Same number of shots for the same nickel.

Q. Why, we meant to have a shuffleboard to explain to the court. Mr. Solomon, will you tell the court what a shuffleboard is?

The Court: I know what it is.

Mr. McLeskey: I imagine the court knows, but for the record.

The Witness: A shuffleboard is an eight or nine-feet shuffleboard in which a puck is thrown against the pin,

the same as a pool game. This here puck is returned to the player, it is just a pool game, and it registers the score the same as you do in the bowling alley.

Q. It can be played competitively? A. It can be played competitively anywhere from two to eight people.

Q. And the pucks, do you get the same number of pucks for a nickel? A. Everyone gets the same amount of play. This is the most predominant game in the field today.

Q. The shuffleboard? A. Yes. There are more shuffleboard games than any other type of equipment.

The Court: And one person can play it alone, too?

The Witness: Yes.

The Court: In other words, I can go there and play it an hour by myself?

The Witness: Yes, that is correct.

Q. Do you sell shuffleboard games for the homes also? A. Yes, we sell all types of coin-operated equipment for the homes.

The Court: I suppose that after you have shot five balls or as many as you want, or the individual wants to, you clear the board by punching buttons?

The Witness: No. You put a nickel. That score stands there until you put a nickel in.

Q. And what is the fact as to whether or not these machines, the pinball games and shooting games and shuffleboard games are being manufactured today and sold as toys? A. Well, they have been copied as toys for the last five years. They make any number of basketball games; they call them basketball games, and they copy the pinball very closely. I venture to say even in the city of Columbus I would say there are at least three or four thousand homes

that have pinball machines and shuffleboard in their recreation rooms, some used, some new.

Mr. McLeskey: Cross examination.

Cross Examination.

By Mr. Leach:

Q. Mr. Solomon, you referred to that machine as an ordinary pinball machine? A. Yes.

Q. I assume there is some sort of a distinction? A. No. I just use that as a term to distinguish it as general run rather than ordinary.

Q. Well, what different types of pinball machines are there, if they differ; I mean, how do they differ? A. Well, they differ in their playing fields.

Q. In what way? A. Well, these machines are designed, as I said before, for player appeal. Now, as a rule, when a new machine comes out, a new piece of equipment, it has a different face on the board, a different way to score, the bumpers will have different angles, the designs be varied, the players get a variation of play. In other words, if a player wants to play on this pinball for a period of time there, he would probably get weary and tired, so we have to invent new types of playing fields.

The Court: Have different hazards and different scoring?

The Witness: The bumpers are placed in different positions.

The Court: Have different scores?

The Witness: That is correct. Some have scores in the millions, some in the thousands.

The Court: But the principle is all the same?

The Witness: All the same.

Q. I would like to clarify this idea of gambling device in your mind. When you answered certain questions with

regards to gambling device, were you defining gambling device in your own mind as does the Johnson Act? A. Yes, which we believe and the manufacturers believe is the norm.

Q. Are you acquainted with the fact that the Federal, State and City Governments can have different standards and often do? A. Yes, they do.

Q. And what is a gambling device in North Carolina may not be one here, and what it is in the Federal Government may not be here? A. Substantially, it is the same, I would say.

Q. I would like to ask you this, in the way you use the word "gambling device", would you include a machine that was set up for free plays? A. No, I would not. I would not say that it was a gambling device. You are asking me for an opinion there?

Q. I am asking you for a legal opinion, as a matter of fact. A. I can't give you a legal opinion. You are asking me for my own opinion?

Q. Actually, I am asking you how you use the word? A. As I say, we developed our word from the manufacturers' report to us. Now, we are given to understand that they make games for nation-wide sales, and all their games are based upon this.

Q. When you said, for example, that there are no manufactured gambling devices any more— A. That's right.

Q. You did not mean that there are no more free play devices? A. I didn't say that.

Q. Well, I say if you said it, that is what you meant? A. They do manufacture them.

Q. You mentioned that all these games have five balls as of today. How long has that been the situation? A. Oh,

five-ball games have been in existance for 15 years, that I know of, or more.

Q. Well, how long have they been the exclusive type of pinball game? A. Past five years.

Q. By that you mean the manufacture or the use? A. What was that?

Q. By the last five years you mean that no pinball game has been manufactured in the last five years? A. No, sir.

Q. None manufactured in the United States? A. Not in the past five years.

Q. Have any been used in the last five years? A. That I couldn't answer you.

Q. Do you have any now? A. Do I have any? No.

Q. How long has it been since you have had it? A. Five years.

Q. And you are a distributor and you sell to the persons who then rent it out or puts it out? A. That's right, to the operators.

Q. You don't put it in any place of business? A. No.

Q. Could you tell the court just what you do? Well, let me ask you this, when a machine comes new from the factory, is it set up for automatic free play? A. No, sir.

Q. None of them are? A. No, sir. Now, you are asking me if a machine—now, we get thousands of machines in through the year; they may or may not come in with a free play, depending on my order.

Q. They are adjusted at the factory? A. They are made at the factory according to our orders.

Q. Do these machines have scoring devices whereby the free plays are registered? A. Now, which ones are you referring to?

Q. I am referring to that one in particular. A. I don't think that has a free play on it.

Mr. McLeskey: Let the record show that counsel is referring to Exhibit A.

Mr. Leach: What is that?

Mr. McLeskey: I say, let the record show that counsel is referring to Exhibit A.

Mr. Leach: Yes.

Q. Can you tell the court just the difference between a free play machine and a non-free-play machine by the device sitting over there, Plaintiff's Exhibit A? A. There is no difference between the two, other than this particular unit which goes into it.

Q. And where does that unit go? A. It can go in various places on different types of machines.

Q. Is that a unit that is completely taken out and put back in, or is that a unit that you turn off and on? A. You can't put the unit into a machine that is manufactured without a free play.

Q. We will take a machine that is registered for free play. How do you convert it from free-play to non-free-play? A. Well, to convert it to non-free-play you would have to remove an entire mechanism and all the wires, too, all the different nerve centers of that machine.

Q. Have you personally ever changed a machine from free play to non-free-play? A. No, but I have watched it done.

Q. And you have never converted it from non-free-play to free play? A. No. The fact of the matter, we have never converted a machine from non-free-play to free play. We aren't able to. Right now we aren't able to, because it requires a very skillful operation. In other words, I don't

believe that any operator would want to pay for the job; he could buy a new one for the cost that it would take to put a free play in the machine.

Q. And you are assuming it is built without the free play to start? A. It doesn't make any difference, either way it would be a major operation to restore it.

Q. You said free play was allowed in some cities in Ohio, is that true? A. That is true.

Q. By whom? A. By whom?

Q. Yes. A. By the communities therein.

Q. By the law of those communities? A. I imagine so, yes.

Q. You don't know, though, do you? A. Yes, to a great extent. A city like Toledo has a license, I imagine that would be the law of the city, wouldn't it?

Q. It would be the law in the city, but, well, enough of that. Now, you discussed other types of machines, such as the target game at the back of the room, shuffleboards, bowling alleys and so forth; you also testified as to your opinion of how much skill and how much chance goes into the playing of a straight pinball machine. Would you say that there is more skill or less skill with regards to the bowling alley? A. It is primarilly skill.

Q. And it is more skill than the pinball in relation to chance? A. A trifle, I would say.

Q. A trifle? A. Yes.

Q. Now, you just stated that a bowling alley is primarily skill? A. I say all skill.

Q. A bowling alley is all skill? A. Yes.

Q. And a pinball is only slightly less skill? A. Slightly less. I want to amplify that. I want to add something to

it. If you have ever seen a skillful pinball machine, you will see they are almost as skillful as a bowling alley.

Q. That might be, but take the average player, average individual, if you were to play the pinball machine and also play the bowling alley machine and attempt to get as good scores as you could, in which game would skill be as important? A. I would say either one. The average man, you get the same reaction on both of them. There are people who are always more proficient in one thing or another, but the average man will do as well on either one.

Q. What I am getting at, if you were not proficient, your chances of doing well on the bowling alley would be pretty poor, would they not? A. Yes.

Q. Whereas you would have a fighting chance on the pinball machine? A. I would say that goes with any type of sport. You are asking me a question that is pretty hard to answer. There are people who are more proficient in many things, and less in others, and if you pinpoint your question, I am not going to answer it.

Q. The testimony with regards to the bowling alley also applies to the shuffleboard and target games and what have you, it is almost entirely skill? A. In shuffleboard and guns, did you say? Are you getting away from the pinball now?

Q. Yes. A. I would say it was primarily skill, yes.

Q. Now, then, you testified with relation to the feeling of the manufacturers and their attempts to make everything for amusement without the elements of chance creeping in. There have been slot machines manufactured in this country, have there not? A. Since 1950?

Q. No, from 1850. A. Oh, yes.

Q. Are any of the companies that presently manufacture pinball machines the companies that did manufacture slot machines? A. No, sir.

Q. None? A. Not to my knowledge. The present manufacturers never manufactured slot machines.

Q. Who did manufacture slot machines? A. All those companies are out of business or have deferred, reconverted to other enterprises which are not in the coin machine business any more.

Q. Were they corporations? A. Yes, large ones, too.

Q. Are the leaders of those corporations and the officers of those corporations presently making pin games? A. No.

Q. They are not? A. None of them are connected with the amusement game manufacturing today; none that I know of. They closed their doors as far as the slot machines are concerned. The only one that is actually open today is the Mills Novelty Company, and they are manufacturing Coca-Cola machines and freezers.

Q. You have been connected with the pin games for how long, sir? A. 25 years.

Q. While you may not be adept at operating a pinball machine, certainly you have been closer to that than the average person? A. That is correct.

Q. I would like to have another demonstration of this machine, if I could, by you. A. Yes, sir.

The Court: As I understand, Mr. Solomon, where you get the free play, that is because you acquire a certain score with five balls and then that automatically gives you another five, is that right?

The Witness: Are you talking about where there is a free play?

The Court: Where there is a free play.

The Witness: The score would determine, yes.

The Court: And then it is automatic, is it?

The Witness: Yes.

The Court: Does somebody have to do something?

The Witness: No, it is automatic in there.

The Court: That's all I want to know.

The Witness: It automatically registers there.

The Court: All right.

Mr. McLeskey: I am sorry we can't take this off. I only saw one, but it is just a maze of wires. Can you take that off?

The Court: I don't think it's necessary.

The Witness: You can take my word for it, it is a plumber's nightmare.

The Court: I am perfectly willing to take your word for it.

Q. Referring to Plaintiff's Exhibit A, in this demonstration it shows on the back board the visitors have 40 points. Now, is that the points that remained from the previous game? A. Well, I may tell you you are asking me now something about this game I don't know. You see, they manufactured approximately 5,000 different games since I have been in business, and this is one of them that I don't remember how this actually—you would have to get someone else in here.

Mr. McLeskey: May I interrupt to say we do have someone here.

The Witness: There will be someone else to testify about this piece of equipment, because I don't know this piece of equipment very well.

Q. Well, referring to this particular piece, and I won't necessarily confine you to this, but all the big lights are

lighted up when you put the nickel in? A. On this machine, yes.

Q. On this machine? A. Yes.

Q. Now, is that the case in every machine? A. No. Some the lights will be out, and you turn the lights on by playing them, or half of them will be out and half of them on, half of them you have to turn out and half of them you turn on.

Q. Are those always the same for each player? A. Yes.

The Court: Then, some machines, I believe, have those hazards, or whatever you call them, and when the ball hits them they light up?

The Witness: That's right. On some of them they turn out the light.

The Court: Yes.

Q. Are there pinball machines manufactured whereby you put in more than one nickel?

The Court: At a time, you mean?

Q. At a time, before commencing to play? A. Yes.

Q. And would you describe to the court the operation of those machines as distinguished from this machine here? A. Well, where there is more nickels put in the machine, it means more than one player can play. On a shuffle alley, there is six players can play on it; you can put in six nickels at a time, and if three men want to play, they each play two games at a time, or if six want to play, they play six alternately.

Q. Is there a pinball game whereby you put in nickels and the odds change? A. I don't have any such machine.

Q. Well, are there any such machines? A. I don't know. I haven't seen any.

Q. You haven't seen any? A. No. I don't handle none in my place.

Q. I realize you don't handle them in your place, but I would like to know whether or not you know that exists? A. Oh, there are machines that exist with different types of odds changes in them in the past, yes. As I have stated, they don't make them any more.

Q. Well, would you play the first ball for me, sir? A. Yes.

Q. Now, we still have all the lights lit except 1 and 6?

The Court: The ball hit that one, and I noticed it went out.

The Witness: Yes. The way I am playing it now, I understand this game you have to turn the lights out in consecutive numbers in order to turn them out. In other words, I would have to hit No. 2 in order to turn out 2.

Q. If you hit 4, it will stay lit? A. It will stay lit until I get out No. 2 and 3.

Q. If you were to put the ball through here—

Mr. McLeskey: That is between 1 and 5?

Q. Between 1 and 5, and coming back to the place reading, "Only when lit," you would get no points, is that correct? A. You would probably get additional points. I guess that is a frame.

Q. Well, it says, "Only when lit," doesn't it? A. Yes. Well, it lights before you shoot the ball, as a rule, and you get additional points.

Q. What makes that light up? A. Well, I imagine the batteries in the machine.

Q. Are a lot of these constructed so that the play has nothing to do with whether or not the lights light up? A. Well, they are constructed in this particular type of manner; now, most of them, they operate on a different basis such as I say to turn out these five lights, then this would probably light up, then if you turn out something

else, something else will light up, see, in consecutive order That is the basis of all pinball machines, and you have t get over a certain hazard to get over into another one.

Q. If you were to pull the plunger back to a certain point and shoot, say, 10 or 100 balls, would they go one place? A. Substantially, I would say, yes.

Q. Well, I wonder if you would try to shoot the next four balls approximately the same place? A. Approximately the same place?

Q. Yes, and, of course, you can use that indicator to the fullest extent possible.

A. I don't understand. I don't get the meaning.

Q. Well, what I am getting at is this, you have here an indicator on the plunger which permits you to pull the plunger far or close, and various degrees, and on that indicator are little marks so you could pull that plunger back to the almost exact same spot. Now, if skill were quite important, you would come out the same place? A. I would say approximately.

Q. I would like to see you do it four times. A. Well, I am not skillful.

Q. Well, I am not, either.

The Court: That depends on your technique?

The Witness: That is correct.

The Court: If you vary it—

The Witness: What he is asking me to do is something that requires practice, see?

The Court: Yes.

The Witness: On the first chance, I may not come close to it, but the point of this game is to become proficient.

Q. But you have been in the business 25 years. You have an indicator. I would like for you to attempt it, and we will

see what happens. Maybe it will hit four straight times. A. Now, you just made a statement I have been in business 25 years; now, that doesn't make a pinball player out of me.

Q. I realize that, but you are more closer to it than I am. A. Well, I can sell pianos 25 years and not become proficient at it.

Q. That's right. A. Well, I tried two out of four down around the same angle, here.

Mr. McLeskey: Well, as long as that is in the record, I would like the record to show that two out of the four balls went through the area between 5 and 3, one of them went through the area between 2 and 4, and the fourth ball came between the area of 1 and 5.

Mr. Leach: I thank you.

The Witness: Will that be all?

Mr. Leach: Well, just a moment. I think it is.

The Court: You don't claim, Mr. Solomon, that you have the exact amount of pressure when you released that plunger on each one?

The Witness: I believe if I play that machine for a half hour I could do it.

The Court: I mean on this particular occasion.

The Witness: On this particular occasion I tried, but I wasn't too successful.

The Court: It is pretty difficult to have the exact pressure on it.

The Witness: That is correct, until I am acquainted with it.

The Court: I understand.

Q. Now, then, you also—just one more question, please. You also testified that in your opinion you can do much better operating these without payoffs? A. That is correct.

Q. And you testified that you are a distributor rather than an operator. Now, then, do you know whether there are payoffs or there aren't? A. Well, by the volumes of machines that we sell today.

Q. Well, if you sell me a machine and I turn it over to a drug store operator, how do you know anything about how that machine is operating? A. I don't know how the machine is operating at its destination.

Q. All right. A. I have no way of knowing it.

Mr. Leach: That is all.

Redirect Examination

By Mr. McLeskey:

Q. Why, Mr. Solomon, I believe you stated that you were not experienced in the operation of Plaintiff's Exhibit A, is that correct? A. I am not acquainted with what?

Q. You are not experienced in its operation and play? A. That particular machine, yes. I have seen that machine before, but that machine I imagine is two or three years old, and I have forgotten about the different features on it.

Q. Now, from your playing of this machine, would you say that the playing of that machine is primarily a matter of skill? A. I would say mostly skill, yes.

Q. Yes, mostly skill. What is the problem with that machine there? What is the game? What is the object of the play? A. Well, the object of playing that machine is to turn—

Mr. Leach: I am going to object to that question.

The Court: Go ahead.

Q. Go ahead. A. The player's object?

Q. Yes. A. The player's object in playing a machine of that particular type is nothing more than to derive a certain

amount of amusement from playing it. He is getting a nickel's worth of fun.

Q. What about those lights, what connection, if any, do those lights have on the game? A. What do you mean, what connection does it have? It merely signifies to the player what type of hazard to overcome, no more.

Q. No more, no less? A. That's all.

Q. Mr. Solomon, from your playing of this machine, have you been able or can you determine wherein lies the skill in the operation of the machine? A. The skill in any piece of equipment is not always available to the player the first time he plays the piece of equipment there; this piece of equipment, like all games, whether they are shuffleboards, target games, have to be played a few times in order to gain some skill.

Q. Would that be true of any game? A. That would be true of any game. You just can't walk over to a coin-operated device and shoot a perfect score, whether it be a shuffleboard, target game; you have to become proficient in this game. Most people that walk up to the pinball machine try it out to see what they can do on the machine.

Q. Mr. Solomon, in Ordinance No. 1615-54, in the preamble to that ordinance, is this recitation, "Whereas even the so-called amusement only pinball machines are so constructed as to be almost identical in appearance and operation to certain gambling devices per se." Is that statement true? A. It is not. That is a false statement.

Mr. McLeskey: Anything further?

Recross Examination

By Mr. Leach:

Q. You are again using the word "gambling device" as used by the Federal Government, is that correct? A. Well,

I believe that you can choose any meaning you want. You are asking me.

Q. I will ask you, then, what is a gambling device? A. I will say this, as a gambling device per se? You are asking me as to per the Federal Government, and my own opinion?

Q. I am asking you now what is your own opinion as to what is a gambling device? A. My opinion of a gambling device is anything that pays out any merchandise or money, is my opinion of a gambling device.

The Court: Depending upon the score?

The Witness: Depending upon anything.

The Court: I say, it depends on the results of the plays.

The Witness: That's right.

Q. Would a cigaret dispensing machine be a gambling device? A. No. It can be.

Q. If a machine paid out a token, would it be a gambling device? A. If a coin-operated piece of equipment paid out a token?

Q. Yes. A. It would depend why it gave them a token. Now, there are cigaret machines that give back a coin, they are giving you change.

Q. Let us assume that pinball machine, Plaintiff's Exhibit A, were to kick out a token of some sort. A. It would be a gambling device.

Q. What was your answer? A. It would be a gambling device per se.

Q. And if that machine were rigged for automatic free play payoffs, would it be a gambling device? A. I don't believe so.

Mr. Leach: All right. No further questions.

Redirect Examination

By Mr. McLeskey:

Q. Mr. Solomon, is it your position, then, that the mere giving of another play free of charge does not amount to gambling? A. It is not gambling. A free play is not a thing, or in my opinion a free play is not a thing of value.

Q. Now, going back to this Ordinance No. 1615-54, another recitation in that preamble is to the effect that the operation of pinball machines and similar machines involving chance or skill, or reworded, I want to change those words, involving chance or skill encourage gambling. Would you say, from your experience, that a machine like this machine, Plaintiff's Exhibit A, would you say involves primarily skill, that encourages gambling? A. This machine in itself will not encourage gambling, in my opinion.

Q. Can you gamble on a machine like this, itself? A. Yes, you can gamble.

Q. But is there any gambling device in the machine? A. No.

Q. What is the difference between Plaintiff's Exhibit A and a slot machine? A. Well, a slot machine is manufactured or made for the purpose of throwing out awards as they are played. In other words, in the terms of the trade, it was known as a machine that spits.

Q. Can you use a slot machine for any purpose other than the matter of chance? A. No, sir. A slot machine could not be used for any other purpose but gambling.

Q. Would you say, then, it is or it is not inherently a gambling device? A. The slot machine?

Q. Yes. A. Is inherentiy, yes.

Q. Is Plaintiff's Exhibit A inherently a gambling device? A. Absolutely not.

Q. Now, Mr. Solomon, in this noted preamble to 1615-54, we find this statement, "Even the vast majority of such so-called amusement only devices are readily converted to gambling devices." Would you say that statement is true or not? A. It is not true.

Q. I believe you have testified this machine is not easy to convert to a gambling device, is that right? A. It is not. All these machines are so complicated it is almost impossible—I would say it is impossible to convert it readily to any other type than it is.

Q. Than it is? A. Yes. They are too sensitive.

The Court: Well, is that the only way that this can be used for gambling, for two or more players to wager among themselves?

The Witness: Yes, it can be used for gambling in that manner.

Q. Is that kind of gambling any different than on gambling on the Ohio State-Iowa football game? A. No.

Q. Or a football game out at the stadium? A. No.

Q. Or a bowling game? A. It is no different than any other form of gambling today.

Q. If this machine is used for gambling, gambling must be a separate part from the machine itself? A. That right. The machine itself cannot give anything.

Q. Is that true of a slot machine? A. No. A slot machine on occasion will pay.

Q. And are you sure when it will pay? A. No.

Q. Nobody is sure, are they? A. No.

Q. Is the payment of a slot machine governed by chance or by skill? A. Pure chance.

Q. Pure chance? A. Yes, there is no skill involved in a slot machine.

Mr. McLeskey: Anything further, Mr. Leach?

Mr. Leach: Yes, just one thing.

Recross Examination

By Mr. Leach:

Q. Yoy mean to say that a slot machine could not be used except for gambling? A. I don't see how it could be used for anything but gambling.

Q. In the past, there have been slot machines in private homes, have there not? A. Yes.

Q. And the owner of the machine would play the machine, wouldn't he? A. Yes.

Q. Would that be gambling? I am not saying it is done very often, I am just asking the question it can be done? A. Well, it sounds ridiculous to me that an owner would have a slot machine that throws out coins and gambling himself.

Q. Have you ever known it to be done? A. Yes.

Q. It is ridiculous, but it is done? A. Yes.

The Court: He takes his friends in there to play it, too?

The Witness: I think that is the purpose.

Q. It is nonetheless gambling even if his friends come in, is it? A. Well, I think in all states, yes. In fact, I think the law says they have to be gambling, playing it as a gambling device per se.

Q. It can't be used for anything else, can it? A. Well, you can find a certain amount of amusement in the ridiculous. As I just stated, I said it would be ridiculous to say it is an amusement device.

Redirect Examination

By Mr. McLeskey:

Q. Mr. Solomon, when Plaintiff's Exhibit A is used for its normal purpose, that is, for the purpose for which it

is manufactured, Will it be used for gambling? A. If it is used in the normal sense that it is placed in the location for, it cannot be called a gambling device; I don't believe it can be.

Q. If it is used for gambling, the gambling must be between the players, is that right? A. That is correct.

Q. And not inherently in the machine? A. That is correct. In fact, in recent years the trend toward home consumption of these pieces of equipment whereby people buy them for their children to play with them at home, they say they get enormous amount of amusement and keeps them at home. If you say it is a gambling device, I don't think they want to encourage gambling in children.

Mr. McLeskey: That is all, unless the court has something. That is all, Mr. Solomon.

Call Mr. Windmiller.

Emil Windmiller,

called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Examined by Mr. McLeskey:

Q. You may state your name to the court. A. Emil Windmiller.

Q. Where do you live, Mr. Windmiller? A. 1685 Tremont road.

Q. A little louder. A. 1685 Tremont road.

Q. Tremont road in Upper Arlington? A. Upper Arlington.

Q. What is your business, if any, or businesses? A. Well, businesses. I operate, holding the real estate I have, operate a restaurant that I have, and I am also an operator of coin-operated equipment.

Q. How long have you been operating coin-operated equipment, Mr. Windmiller? A. Oh, for the past 18 or 19 years.

Q. And at the moment, how many coin-operated devices do you own or have? A. Around 100.

Q. And what is the value of those devices, approximately? A. Oh, from one time to another it changes, I suppose.

Q. Roughly? A. Roughly, approximately $50,000.

Q. Does that include juke boxes of any kind or not? A. Some juke boxes I have, yes.

Q. Now, confining yourself purely to what we call pinball machines, how many pinball machines would you say you own? A. Oh, maybe 60, 70.

The Court: 60, 70?

The Witness: 60, 70, yes, sir.

Q. Now, do you own any shuffleboards? A. I missed that question when you asked me—

Q. Yes? A. When you said "outside of juke boxes", so I said 60, 70; I would say 60, 70.

Q. Includes— A. Shuffle alleys and all kinds of games except juke boxes.

Q. Can you break down for me how many purely pinball machines you own and shuffleboard machines you own? A. Well, about half and half.

Q. Do you have your shuffle board in operation in Columbus? A. Yes, I do.

Q. Has any effort been made to obstruct you in the operation of those shuffleboards under these ordinances? A. Under these ordinances—

Mr. Leach: If the court please, I am going to object to that for this reason.

Mr. McLeskey: I will withdraw it for a moment. I will come back to that later.

Q. All right. Now, going to this pinball machine, Mr. Windmiller, is Plaintiff's Exhibit A your machine? A. My machine.

Q. Are you familiar with it? A. Yes, I am.

Q. And its operation? A. Yes.

Q. Would you please operate that machine for us? Mr. Solomon said he wasn't very skilled. Please operate the machine, and as you do it, describe the operation to the court and tell us what elements of skill is involved and what elements, if any, of chance is involved. A. Well, what I am going to do here now is reach in here to flip this little switch.

Q. What does that do? A. That releases five balls.

Q. Just the same as if you put a nickel in there? A. The same as if I put a nickel in there. I will start off here and shoot a ball. Of course, the object is to get the highest score on each ball.

Q. And the score is registered here? A. It is registered on the back lights.

Q. On the back lights. All right. A. So I will use just one ball, and you can see how high a score I will get. When I play these things, I like to shake them. This is like any other game, I mean, the more experienced you are at it, the better you are. I can set here and play this game for five minutes or more, if you want me to, on this nickel.

The Court: You lost it?

The Witness: Finally lost it.

Q. What is this, the second ball? A. Second ball I am shooting. I am doing the same thing. I am supposed to try to get as high a score as I can.

Q. That is the purpose of the game? A. Yes. There is no other score registered here in this machine, that is the five lights here.

Q. What is the game in reference to these five lights, Mr. Windmiller? A. That is an extra score. It is hard to knock out those numbers, because you have to knock them out in order; they are wired in sequence.

Q. You have to knock them out one, two three, four, five? A. Right in order, but that is an extra hazard.

Q. And is that a matter of skill? A. That is a matter of skill. I mean, that just depends upon how you would shoot this. I won't say that I can always knock them out, but that is one of the skills of the game.

The Court: That is your main target, that hole in the middle, isn't it?

The Witness: That is one of the main targets, because that gives you the points.

Q. What do you get when you hit that main hole in the middle? A. You get an extra point, as you can see here.

Q. Yes. A. I want to hit 5, now.

Q. All right. Now you have got four of those numbers, didn't you? A. Yes, I did.

Q. What would have happened if you got the fifth? A. I would have got an additional score.

Q. Additional score? A. Yes.

Q. And you say the putting out of these lights, these five lights, is a matter of extra skill, is that right? A. Yes, it would amount to the highest possible score you could get.

Mr. McLeskey: Any questions, Your Honor, please, before he leaves the machine?

The Court: Just a minute, Mr. Windmiller. Where it says "45" up there, where does that come from now?

The Witness: Well, that 45 comes from hitting on here certain bumpers, it switches over, this going over here switches over from this line.

The Court: That is sort of a penalty for the player?

The Witness: That's right, it switches back and forth. One time you might hit a bumper and it registers here on the Home Town, and another time it switches to another score.

Q. Does each player get the same number of balls with this machine for his nickel? A. He does.

Q. Does this machine have any kind of a free play machine on it at all? A. This machine does not.

Q. What does the player get for his nickel? Does he get anything of value? Does he get amusement, or what does he get? A. He gets nothing but amusement.

Q. It is purely an amusement device, as it was set up? A. I was on the machine three minutes, that is, the length of what you get on the juke box record.

Q. How long can a skilled person play this machine for a nickel? A. Oh, he could stand and play five, ten minutes. I have stood and played this machine eight or nine minutes on just one nickel.

Q. Now, does this machine, Mr. Windmiller, release any merchandise of any kind? A. No, it does not.

Q. Checks? A. No checks.

Q. Tokens? A. No tokens.

Q. Or any free plays? A. No free plays.

Q. What, if anything, does the player then get from that machine for his nickel? A. He gets only amusement.

Q. And upon what does the score that the player makes depend with that machine? A. Well, it would depend mainly upon his skill.

Q. His skill? A. Yes.

Q. Now, on that particular machine, what does the skill consists of, wherein lies the skill? A. Well, the skill is to

how skillful he is when he shoots the ball; when he shoots the ball, it depends on how he operates the plunger on the side of the machine, his skill as to where he could shoot the ball and hit one, two, three, four, five, in order like they should be.

Q. If that happens you get a higher score, I believe you said? A. Yes, you do.

Q. All right. Now, from your experience with this machine, Mr. Windmiller, would you say it is a machine that involves skill or involves chance, this game? A. This machine involves skill.

Q. Involves skill? A. Yes.

Q. On pinball machines operated as amusement devices at a profit? A. Oh, yes.

Q. From your experience in dealing with these machines, Mr. Windmiller and, by the way, how many years of experience have you had in dealing with this type of machine? A. Oh, 18 or 19.

Q. From your experience in handling these machines, would you say they tend to encourage gambling? A. No, they don't tend to encourage gambling.

Q. Are they readily convertible to a gambling device? A. Well, it's a lot of work to take that machine, convert it into a gambling device.

Q. Can you do it? A. Yes, I could do it.

Q. How long would it take you? A. Oh, I have worked on it for hours and hours and hours, if I wanted to make it into free play, not a gambling device.

Q. Yes. Suppose you wanted to put it onto free play, how long would it take you to do it, if you could at all? A. Well, it would take me at least a day.

Q. Then, would you say that the free play device is readily put on this machine or not, easily put on? A. No, it is not easily put on.

Q. Could the average person make that adjustment? A. No.

Q. Now, in your experience in dealing with these machines, have you found that they encourage idling and loitering around the places where they are operated? A. I wouldn't feel that they did; I would say it was the other way, I would say if there was somebody around, nothing to do, he could play and utilize his time a little bit.

Q. Are there other games that you do know that do encourage idling and loitering? A. Well, sure. I mean, wherever there are people, you will find idling or loitering, anywhere. I mean, any sporting events, I mean, you will find people loitering around.

Q. Now, these machines register a score, do they not? A. That is correct.

Q. Are there other machines besides this machine that registers a score? A. Oh, yes, there are numerous machines.

Q. Does this machine book or register a score? A. Oh, yes, it does.

Q. Can you name other machines that register a score? A. Oh, shuffle alleys, football games, we have basketball games, rifle guns and hunting guns like that—what is the name—the Bear Hunt; like you have a gun standing on one side of the room, and over there is a target, and you shoot at raccoons or rabbits or whatever it is.

Q. Now, let's take the character of a slot machine, can a slot machine be used for anything other than gambling, Mr. Windmiller? A. Well, I don't think it could.

Q. And where is the gambling inherent in the machine, or is it a matter for the players? A. It is made for that purpose.

Q. Made for that purpose? A. It is made so you spin the wheels, if it stops on the right number you will get money or merchandise.

Q. Here you have no other purpose? A. No, it has not other purpose.

Q. What is the difference between that kind of machine and Plaintiff's Exhibit A? A. Well, as I showed, that machine has a score on it. That machine, you can stand there and get four to at least three minutes of amusement from that machine when you shoot five balls. A type of that, that machine does not discharge anything. I mean you don't get no money out of that machine or slugs or tokens.

Q. Is there anything in the machine itself that makes it a gambling device, a matter of chance or game? A. No, there it not.

Q. If two people gamble with that machine, how is it done, in connection with their playing, themselves? A. Well, they would be gambling among each other.

Q. The machine does not do the gambling, is that it? A. That is correct.

Q. Have you had occasion to observe whether or not gambling is conducted in connection with the ordinary football and baseball game? A. Well, there is always a certain amount of that goes on. I have some of that in my own place of business.

Q. People that make up— A. Football pools.

Q. Pools? A. Spot each other points on who is going to have the biggest score.

Q. Is that kind of an arrangement any different from the arrangements of the kind of a game, any difference with the arrangements you could have with Plaintiffs' Exhibit A? A. You can find that on the pinball machine in the same way.

Q. Two men bet on their score? A. That is correct.

Q. Now, Mr. Windmiller, on the machines that you use and you furnish, are there any labels on those machines? A. Yes. On almost all our machines that these are amusement machines. You have a label on there.

Q. Do you have a label on Plaintiffs' Exhibit A? A. Yes, I do. That is the label that is on there.

Q. The label that is on there? A. Yes.

Q. That label reads this: "To patrons, you must be 18 years old to play this machine. Play for amusement only. No moneys, prizes or tokens given or awarded." Is that the typical label that is on your machines? A. That is correct.

Q. And from what you have observed, is that general label generally on the machines that are played in Columbus, or do you know? A. Yes.

Q. Now, Mr. Windmiller, were you operating these machines in Columbus before they were licensed by the city? A. Yes, I was operating them, I suppose, eight or nine years before that.

Q. And did you operate these machines after they were licensed by the city? A. Yes, I did.

Q. What attitude did the city take toward the operation of these machines during the licensing period, while they were under license? A. Well, while they were under license I happen to be the one that helped them to write the licensing ordinance, and I met with the officials of the city.

Q. Prior to that time, had they had any regulation whatsoever? A. No regulation.

Q. So you helped to write the ordinance. Go ahead. A. I felt very happy after that because it would help in the meanwhile to establish us in what we thought was a legal business—

Q. Yes? A. By the licensing ordinance, we felt that, whereas over the years somebody would say, "Well, you are in this business or that business," and I happen to be in the pinball business, and oftentimes they frowned on me. After we had a license, we figured, and in my own self I figured that here and now I was in a legitimate business.

Q. Did the city cooperate with you during those days? A. Yes, they did.

Q. And you cooperated with the city? A. Yes

Q. Did your business grow during that period? A. Oh, yes, my business grew during that period.

Q. When these ordinances were passed, the first one in 1950—Wait a minute, here. 1953, April 10, 1953. Did your business grow right along under the licensing arrangement? A. Yes, it had.

Q. How large was your business at that time, approximately, Mr. Windmiller? A. Oh, I suppose then I operated a hundred of these machines.

Q. A hundred of these machines. All right. Did the city, under the licensing system, regard your business as being a legitimate business? A. Yes, they did.

Q. And was it so treated? A. Yes, they did.

Q. You paid license fees to the city? A. I paid a lot of license fees.

Q. Now, along about in April of 1953, did you have any conversation with Mr. Cook, who was then the safety

director, or Mr. Harrison, who was then the chief of police? A. Yes, I did.

Q. Where did that conversation take place? A. In the hall, over at city hall.

Q. What was the conversation; what, if anything, did they say to you or you to them?

Mr. Leach: Objection.

The Court: Well, probably it would be objectionable except for the fact Mr. Cook was at one time a party defendant.

Mr. Leach: Yes, he was a party defendant and safety director at that time.

The Court: I think I will overrule it.

Q. What position did Mr. Cook hold at that time? A. He was safety director.

Q. And Mr. Harrison? A. He was chief of police.

Q. The record shows they were parties defendant in this case. Were they safety director and chief of police at that time respectively? A. Yes, they were.

Q. Now, what did they say to you and what did you say to them? A. Well, I met them in the hall, and Mr. Donald Cook said to me, "Why, hello, Emil." I said, "You are just the man I want to see." He said, "You should have come to see me about six months ago." He said, "You shouldn't be coming to see me now. You are too late." He said, "We are going to put you boys out of business."

Q. Was Mr. Harrison present when that conversation took place? A. Yes.

Q. Was he present? A. Yes.

Mr. McLeskey: We are proving that allegation in the petition.

The Court: What reason did he give for the statement he made?

The Witness: He smiled and walked on, he and Mr. Harrison, so I had no opportunity to find that out, other than he just smiled and kept on walking down the hall. We were over there—I was over there at the time, which was on a Monday night when council was meeting on these ordinances.

Q. The first two were under consideration? A. Well, it was the first one that was under consideration.

Q. 156-53 and 157-53. All right, and d'd this conversation occur in connection with the consideration of those ordinances, Mr. Windmiller, or not? A. Well, I was over there for that purpose.

Q. For that purpose? A. Yes.

Q. And Mr. Cook just approached you and made that statement? A. They were walking down the hall, and I came around the corner and walked right into them.

Q. Now, Mr. Windmiller, this last ordinance, which is No. 1615-54, prescribes or prohibits the possession or custody of table games and refers specifically to pin games or pinball games. Now, are pin games or pinball games the only table games that are being operated in Columbus? A. Well, any kind of a game that would be operated would have to be upon a table, on legs or feet or something.

Q. Well, just name some of those that are being operated that are of the same character table games. A. Well, like shuffle alleys, shuffleboards, pinball machines, some of those hunting guns I have been referring to upon feet or legs.

Q. What about billiards? A. Billiards is on legs, pool tables is; it's a new game in our business.

Q. Pool tables are a new game in your business? A. It is a coin-operated machine, it's on legs and feet, it's a table.

Q. Instead of operating with a ball and a cue, I believe that is what they call the old game, you operate with a coin, is that the difference? A. Well, yes. You have to put a coin in to play.

Q. You still operate with cues and balls? A. Yes, we do.

Q. Now, when this last ordinance was passed, 1615-54, this first cause, No. 187,169 was pending, was it not, in this court? A. Yes.

Q. And had been to the Court of Appeals, had it not? A. Yes.

Q. It had been reversed and sent back? A. Yes.

Q. Were you given any notice whatever or any opportunity to be heard before 1615-54 was passed by the council? A. I was given no notice.

Q. Were any of you people who operated these machines given an opportunity to be heard?

Mr. Leach: I am going to object to this question, what anybody else had been notified had nothing to do with it. The city of Columbus or the state of Ohio does not have to go out and give notice when they pass an ordinance.

The Court: Yes, that is true.

Mr. McLeskey: I think it indicates good faith. It will have to be conceded the city council knew these men were vitally interested.

The Court: Well, they licensed them and then they took their license away without any notice. It may not have any bearing on the materiality, but it may have some definitely as reflecting on the attitude of the city.

Mr. McLeskey: On their good faith, I think that is true.

The Court: Of course, whether it is a valid ordinance, the reason for passing it would be material.

Q. Now, Mr. Windmiller, after you talked with Cook and Harrison out in the hall, do you know whether or not similar threats were made to merchants with whom you had contracts for the operation of these machines? A. I do know that is so. I have been told by those with whom I do business.

Mr. Leach: Just a minute.

Q. Let me ask you this, have you lost contracts with people that you have heretofore being doing with? A. Yes, I have.

Q. By virtue of these ordinances? A. Yes, I did.

Q. And what reason was assigned, if any, for the surrender of the contract and asking that you withdraw the machines?

Mr. Leach: Objection.

The Court: Overruled.

Q. What reasons were assigned for them, if any? A. Well, the reason for that was that these machines were outlawed, or the fact that these machines had a score on them, and they had heard or read in the newspaper these were unlawful machines and they wanted them removed from their premises.

Q. Do you know whether or not any threats were made to them, if you recall?

Mr. Leach: Object.

The Court: Overruled.

Q. Do you recall whether or not any threats had been made to them? A. There were three or four.

Q. Do you recall whether or not anybody informed you that they were afraid to continue to operate the machines? A. Oh, I have that often said to me, that they were afraid to operate the machines.

Q. Has that been since 157, the first ordinance, 156-53 and 157-53, were enacted? A. You say after or before?

Q. After. A. After, yes.

Q. Could you give us any idea how many contracts you lost by virtue of these threats and these ordinances? A. I would say around 15 or 20.

Q. 15 or 20? A. At least 15.

Mr. McLeskey: That is all for the moment.

Cross Examination

By Mr. Leach:

Q. In the demonstration of Plaintiffs' Exhibit A, you showed me at least that you have played those machines before, is that correct. A. That is correct.

Q. Have you played them frequently? A. Yes, I have.

Q. Have you played this particular machine frequently? A. Yes.

Q. If you remember, the back board has two scores, one visitors' score and one home score. Now, where does the visitors' score come from? A. The visitors' score comes from hitting any of the bumpers.

Q. Well, that doesn't change as the game progresses, does it? A. It does, it changes.

Q. Do they both change? A. I am pretty sure they do. There are hundreds of these machines, and each one works different, but I was just over there at that machine, and I noticed I got a score on both sides.

Q. Are you familiar with it? A. Yes.

Q. You don't need to walk over there. A. I could walk over there, if you felt it was necessary.

Q. I think we are both tired. As you hit the various bumpers and what have you, did you change both of those scores or only one? A. I changed both of those scores, because when I started off playing the machine, they were both reset to zero, so when I was done shooting with that machine I had a score on both sides.

Q. Well, now, I think we better take a walk. All right. Yes, I got a score up here, I got a score down here on both.

Mr. Leach: Well, now, I would like to state for the record that Plaintiffs' Exhibit A now shows the visitors' score at 45, the home team at 15.

Q. I would like to ask you to clear the machine, if you will. A. Yes. Oh, the machine is stuck in the cycle.

The Court: We will have an intermission at this time.

Brief recess had.

The Court: You may proceed.

Q. I believe you stated, Mr. Windmiller, that in the operation of that game, were you to hit the bumpers at the top in consecutive order, 1 through 5, that you would get a very high score; is that correct? A. Yes, it would be the highest score you could get on the machine.

Q. Is there any indication by level or otherwise which would indicate that fact to the player? A. No, there is not.

Q. You also pointed out on Plaintiffs' Exhibit A the flippers on that machine. Do all of the pinball machines contain flippers such as that? A. I would say most of them do.

Mr. McLeskey: Will you explain what you mean by "flipper"? Now, for the record, I don't know what you mean.

Mr. Leach: For the record, as I mean, the word, it is a device upon the machine which enables the player by pushing a button to propel the ball back upon the field of play.

Q. Would that be correct, Mr. Windmiller? A. That would be correct.

Mr. McLeskey: All right.

Q. Are some of those machines constructed so that once you pull the main plunger you then lose control of the ball except by way of tilting? A. Well, that is one of the things that you do when you play a pinball machine, is shake or tilt it. I have seen thousands of people, after they shoot that ball, they never lose control of it, because they are shaking the machine or doing something to the machine all the time the ball is in play.

Q. Are the machines constructed so that he loses control that you have over the ball after you originally release the plunger? A. You are speaking of the machines with flippers?

Q. Yes. Do you have any? A. Yes, I do.

Q. Would you say that the element of skill is greater in a machine having flippers than a machine not having such a device? A. The skill is the same, I think, in either one.

The Court: Those with flippers on give you more opportunity to a certain cycle?

The Witness: Yes, more play.

Q. Now, then, during the recess we discussed this particular machine, Plaintiffs' Exhibit A, and I believe you cast some doubt upon whether that machine is in proper order; is that correct? A. Yes, there is a question whether it is or not.

Q. Would it be asking too much of you to bring in a machine that is in proper order, to your satisfaction? A. I

would be glad to bring a machine in, but, of course, there are hazards, the machine is hazardous.

Q. I realize that. A. When I tried that machine here, that machine was brought in here not so much for the actual score, but just to show that there is a score on the machine, that there are flippers, what it looks like, that there is no money or tokens come out of this.

Mr. McLeskey: Don't take this.

(Discussion off the record.)

Mr. McLeskey: All right. Bring in another machine.

Q. You also testified with relation to this machine, and free plays, and indicated it would take some time to convert it to free play. Was this machine originally manufactured for free plays? A. I would have to work on that machine to tell that.

Q. You don't know? A. Yes. We buy some of those machines used, and, I mean, what the nature is I couldn't answer it with one firm answer.

Q. Were you to get a machine set up for free play, how long would it take you to fix it so it would not give free play? A. Oh, it would take about a day.

Mr. Leach: I believe that is—off the record. Would it be possible to bring such a machine as that in, one that is fixed up for free play?

The Witness: I would have to fix one. You mean, so it is on free play?

Mr. Leach: Yes.

The Witness: I would have to fix it, and I don't have any like that that is on free play.

Q. Well, have you a machine that is adaptable to free play? Could you bring such a machine in? A. I would have to adapt such a machine.

Q. Well, that's all right. Now, then, you also testified that one way of gambling with a machine like that would be for two players to make bets upon a high score. Could that not be done between the player and the merchant? A. In my case, these machines are installed for the purpose of amusement only. When we make a contract with a person where we are going to install a machine, they are instructed that that machine is to be operated legally and for the purpose of amusement only. Of course, if someone initiated upon his own to do any gambling upon that machine, that would be far away for me to say; that is something that I know nothing about.

Q. It could be done, however? A. We could gamble with money, too. I mean, we could match coins.

Q. Yes. Now, then, you testified that at one time the operation of pinball machines was licensed by the city of Columbus. Would you tell the court who obtained those licenses, whether it was the individual merchant or whether it was you? A. Well, in most cases it was me.

The Court: As I understand, you own the machine and you acquired the license yourself?

The Witness: Yes, that is correct.

Mr. Leach: May I have this marked as Defendant's Exhibit 1?

And thereupon, as above indicated, the document above referred to was marked Defendant's Exhibit 1.

Q. I hand you what has been marked as Defendant's Exhibit 1, which is the list of arrests for pinballs and ask you whether or not any of those persons upon there were parties who had contracts with you?

Mr. McLeskey: Now, I object for any number of reasons.

The Court: Well, let him answer. It certainly would not prejudice the court.

Mr. McLeskey: Convictions, of course, is what counts, not arrests.

The Court: I understand.

Mr. McLeskey: Note exceptions.

The Witness: Offhand, without my records here, I should say no, although there might be some one exception to this.

Q. Well, I call your attention specifically, I believe it is on that list, to the date of October 5, 1951. A. 1951? All right. Now, wait a minute.

Mr. McLeskey: October 8, 1951?

Mr. Leach: October 5, 1951.

The Witness: October? That would be what, 10—

Q. Yes, 10-5-51. A. All right.

Mr. McLeskey: I am objecting, of course, to all of those questions, if Your Honor please.

The Court: I don't see any reason for going back to 1951. It is when they were licensed.

Mr. McLeskey: They didn't start—that is what I was objecting just a moment ago. They didn't start until April 10, 1953, as far as this prohibition.

The Court: I don't see any relevancy of something that happened in 1951.

Mr. McLeskey: And, if Your Honor please, that list only goes up to the end of 1953.

Mr. Leach: If the court please, I think that is again showing how his machines have been used, without reference to what the law was, I think it can show that.

The Court: You can gamble with an automobile. A fellow might have an automobile and gamble with another

fellow that he can go faster than the other fellow. Would that make the automobile a gambling device?

Mr. Leach: Certainly not; if it were done often enough, I don't think it would have become a gambling device, but if the course of conduct showed the automobile was a dangerous instrument, then you might certainly get ramifications from that, but as an automobile, it certainly does not.

The Court: I think we had better stick to our text here, whether or not this is a gambling device.

Mr. Leach: Well, if the court please—

The Court: I take it that is the question.

Mr. Leach: If the court please, that is not in my opinion the question. The city of Columbus is not resting its case upon the fact that that is a gambling device. The city of Columbus has gone further than has the state law.

The Court: Well, you are claiming it is used for gambling purposes?

Mr. Leach. Not necessarily, no, sir.

Mr. McLeskey: Well, that is the end of your case, if you are claiming that, I would think.

Mr. Leach: No. If the court please, the city of Columbus has enacted an ordinance to prohibit devices such as that, and the plaintiffs contend that such ordinance is unconstitutional. Gambling is certainly involved in this case, but it is not limited to that.

The Court: What is it limited to, on what theory?

Mr. Leach: If the court please, I don't believe that it is incumbent upon the defense to prove the constitutionality of its statutes until the other side has proved the unconstitutionality of the statute.

The Court: Suppose you have a bowling alley, two men go in and bet who will have the biggest score, does that make the bowling alley an improper business?

Mr. Leach: I would say that it does not, Your Honor. I would say a pool room where gambling can be done or it cannot be done, in either case, an ordinance completely outlawing the pool room has been upheld by the Supreme Court of the United States as unlawful on the gambling principle.

Mr. McLeskey: That was on the peculiar constitutional provision of California.

Mr. Leach: Well, that was upheld by the Supreme Court of the United States.

Mr. McLeskey: They said that is what it was for. Your Honor please, I think the finest statement of this thing I have seen, Your Honor, is found in 10 O. J. 2d, 506, Section 428 and 429. This is it. It's just very short. "No trade can be prohibited altogether unless the evil is inherent in the character of the trade. Any law which prohibits altogether an occupation the constitution of which does not necessarily work an injury to the public is unwarranted. It is not sufficient that the public sustains harm from a certain trade or employment as it is conducted by some who are engaged in it. Nor is it sufficient that all remedies for the prevention of the evil which fall short of total prohibition prove effective. The fact that many men engaged in the calling persist in so conducting the business that the public suffer from their actions cannot otherwise be effectually controlled is no justification for a law which prohibits an honest man from conducting the business in such manner as not to inflict injury upon the public."

Now, that is a summary of the Ohio decisions. The court will find in there it simply says that the mere fact somebody may take this machine and gamble on who makes the highest score, does not ban the business at all, not at all.

Mr. Leach: If the court please—

Mr. McLeskey: Russ, would you say that the football games up here at the University should be prohibited because somebody down in an office gambles on a small pool for a dollar apiece?

Mr. Leach: After the Duke game, I would prohibit football, but I think that now is not the time to argue the merits or demerits of the case. I would like the opportunity to brief the legal question on whether or not the city can prohibit this device.

The Court: Oh, certainly. I expect it to be briefed.

Mr. Leach: Now, I don't think that this case can be made or broken by the evidence. I think that both sides are attempting to show the nature of the machine and very properly; however, I think that this is almost to intersect part of our case to show how these machines are in fact used. Now, I am not purporting to show that every time a pinball machine appears there is an arrest made and conviction had. I want to ask Mr. Windmiller whether or not in effect any of his machines were confiscated after arrests were made.

Mr. McLeskey: Suppose he said yes, how would that change the situation? We are not here saying that there has not been once in a while somebody who attempted to gamble on the outcome of the score; we would not say that. There has been, just like baseball, football, bowling, anything else, we don't say that justifies a prohibition of this game entirely, which Columbus is trying to do. The first

time they had an umbrella of games that caused gambling, heavens, that covered a vast field, but they picked out this machine, and we claim that is denial of equal protection. When the Court of Appeals reversed Judge Harter's judgment on the pleadings and came back and passed this specific order and said table games such as pinball machines, then I think they were in worse position than they were before, because then they picked out the specific game and banned it and forgot about other games that did the same thing. I don't think the city can do that. We briefed that till we are blue in the face. The briefs are in these cases.

Mr. Leach: I don't believe either one of us want to brief this any more, but I would like to say the question before the court is may I ask that question or may he answer it or may he not, and I certainly believe that he should, because I believe the background of this machine is vital to whether or not the city can in fact pass an ordinance similar to this one.

The Court: Well, you want to show that somebody has been arrested and convicted for using a machine like this for gambling purposes?

Mr. Leach: That's right.

The Court: I can think of a thousand things that people use for gambling purposes; it does not outlaw the thing in itself.

Mr. McLeskey: All of our fundamental games, if Your Honor please, are.

Mr. Leach: I am not making my point. My point is this, you have various devices, at one end is a slot machine, at the other end is a cigaret dispensing machine; now, basically, I suppose there is nothing wrong with a slot machine.

The Court: Except what they are made for; that is all they are made for, gambling purposes.

Mr. Leach: But if you find enough pools that would play them not for gambling, it's all right, but history has shown there aren't so many of those people.

The Court: I think it has been testified here time and time again the only use for a slot machine we know is a gambling machine, that is all it is for.

Mr. Leach: That's right. I would like to jump over to another field, such as narcotics. There are many valuable uses for narcotics and . ' we prohibit the use of narcotics; it is not because no more than 50 per cent use dope, but somewhere along there you reach the place where it is immoral to possess it. Now, that is basically our ordinance, and it either stands or falls on that point.

The Court: That is, it has limitations, too?

Mr. Leach: Oh, certainly.

Mr. McLeskey: Yes.

The Court: Those who have the right to have it, you certainly couldn't take the right away to have dope, say, from physicians, could you?

Mr. Leach: I don't think you could, because the benefits of it are so great to society that it would be unreasonable for you to completely ban it.

The Court: It has a legitimate use; it is only the illegitimate use that is banned.

Mr. McLeskey: These ordinances ban the possession of these machines, you can't have one of them in your custody; that is the ordinance they passed and the Court of Appeals reversed the decision of Judge Harter. They just said pinball machines, period, bango.

Now, that is the ordinance we are talking about. I think it is worse than the first one, which was a shelter, sort of an umbrella, and yet under the umbrella in Columbus they haven't done a thing about shuffleboards and dozens of games of the same kind, except this, and the denial of equal protection is one of a dozen constitutional arguments we made against these ordinances.

The Court: While we are wandering a little far afield, I think we should confine ourselves to what happened since the ordinances.

Mr. McLeskey: Yes, April 10, 1953.

The Court: Going back to 1951, somebody was arrested for using something like this for illegal purposes—

Mr. Leach: If the court please, I will now confine myself to that. It seems to be that the situation existent at the time of the ordinance's passage certainly bears on the reasonableness of the ordinance.

Mr. McLeskey: If Your Honor please, that was April 10, 1953, not 1951, and the last ordinance was passed on December 7, 1954, just about a year, less than a year ago.

The Court: I think we ought to confine ourselves to the time at which the ordinances were passed and subsequent thereto, are these being used for gambling purposes?

Well, it is time to adjourn until tomorrow morning.

Mr. McLeskey: All right.

(Adjournment until the following day, Wednesday, November 16, 1955, at 9:30 a.m.)

Morning Session, Wednesday, November 16, 1955.

The Court: Now, I want to make a statement for the gentlemen of the press. I think there ought to be some publicity about this.

Just before leaving for home, my telephone rang and some man called me and said, "I understand you are hearing this case about the pinball machines," and I said, "Yes," and he said, "Did men come down there and testify there weren't being payoffs on the pinball machines?" And I said, "Yes," and he said, "Were they under oath?" and I said, "Yes." He said, "Well, how could they come in and perjure themselves in that way?" I said, "I don't know that they are." He said, "Well, you know there are payoffs on all these machines."

I said, "Well, I didn't know that." "Well," he said, "There are payoffs on these machines. My boys are playing them, spending all kinds of money on them." He said, "You ought to stop it." I said, "I try the cases in the Court Room. Now, if you have any evidence there are payoffs, you should communicate with the city attorney. He is the one who is interested." He said, "You ought to go out and bring in the witnesses." I said, "What is your name?" He said, "Well, I don't want to give it." I said, "If you have any information about that, you should communicate that to the city attorney. If you give me your name, I will see that you are subpoenaed and brought in." "No, I don't want to be brought into it," but it was the duty of the court to enforce the law and see that these things were not used as gambling devices, which they are, and I told him if he knew of any violation he should report it to the proper authorities, I couldn't decide cases on what people called me over the phone. I don't know who he was and I said, "As a citizen, you ought to do your duty, and if you know of any violations of law, report it and not call me over the phone," and he told me I ought to go out and get the evidence, because that is not his job. He said, "Well, if they

aren't stopped, I am going to raise hell about it, I am going to do something."

I said, "The way for you to do something is report it to the proper authorities, and that is the city attorney," and he wouldn't give me any more information.

If people know these things, why don't they have the courage to come forward and tell the proper authorities? I get sick and tired of having anonymous telephone calls and letters of people who have not the courage enough to come out in the open and bring the information to the proper authorities, and I just wanted you to know that I had received that communication and that this man claims that there are payoffs but he would not give me any information on which I could get the truth of it or get the information to the city attorney so he could find out.

Now, that was the sum and substance of this communication. I couldn't tell the fellow anything, he was telling me all the time. I tried to tell him what he should do, and he wouldn't listen. He was telling me what I should do, but I don't want to decide cases on what somebody calls me up on the telephone and gives me information; I told him I had to decide it on the matters that were presented in court.

If he thinks people aren't telling the truth, that does not necessarily mean that I don't think they are telling the truth. I have to determine it myself, and not what somebody else tells me.

Now, with that, you may proceed.

Mr. McLeskey: Mr. Windmiller, take the stand for further cross examination.

Emil Windmiller,

resuming the stand, testified further as follows:

Cross examined by Mr. Leach:

Q. Mr. Windmiller, is there a tilt device upon Plaintiffs' Exhibit A? A. I guess there is.

Q. Does such a device appear upon most pinball machines? A. I would say half of them, anyhow.

Q. Half of them? A. Yes.

Q. Is that device adjustable as to degree? A. Yes, it is.

Q. I think we'd better ask you just what the tilt device is. A. Well, when you get to shaking a machine too hard, it will stop the mechanism from scoring. It has a bulb that hangs down in the machine, and when it gets swung from side to side, it will cause a tilt; in other words, that will stop the mechanism from performing.

Q. Now, would you say if the tilt device were adjusted so it readily operated, in other words, with a fine touch, would you say that that would tend to cut down upon the control that the man would have after the bulb had been released? A. I wouldn't want to say entirely that it would cut it down, no. Of course, if it weren't on there, they could lift the machine up in the air and roll it backwards.

Q. If it wouldn't cut it down, what would it do? A. It would stop them from lifting the machine up and shaking it and make a lot of noise. As I said before, they could lift the machine up and roll the ball backwards.

Q. I, of course, don't know how that particular machine is adjusted, but wouldn't you agree if you made it finer than it is now you could not shake it as much as you can now without throwing the machine off? A. Yes, that is true if it is adjusted fine.

Q. Now, then, that machine is, I believe, an all-star basketball machine, or something like that, it contains approximately five round devices near the top of the playing field. I believe that in that machine there are probably only three or four actual holes where the ball drops in. Is that representative of all pinball machine playing fields? A. Every model of pinball machine is made different. I mean, there are new models every month, every six weeks, from certain manufacturers; they are continually changing the industry; there are five or six manufacturers making them.

Q. Could you name those manufacturers? A. Oh, Exhibit E, Bally Jenco, Chicago Coin, Williams Novelty Company. I guess that is about it.

Q. Are all of those machines from the same company, or do you have a few from each? A. Oh, we buy from all of them.

Q. What is the Sportsman type pinball machine? A. The Sportsman, I am not familiar with it. It seems like I have seen it, but I just offhand am not familiar with it.

Q. Do you know anything about the Bally Beach machine? A. Yes, I have seen them here and in Toledo, Ohio. I was up there, I played a number of them. I am not very familiar with the machine itself.

Q. Do you have any machine containing a special number of holes upon the playing face such as this, perhaps seven holes across the top of the playing field and then on down in series, maybe seven more, a few more inches, seven more of that type of thing; did you have any machine such as that? A. We have a few; however, it is not the generally liked machine.

Q. Do you have, other than the one I have just described, do you have any machines containing a substantial number

of holes where the ball drops in? A. Oh, yes. You have machines with all kinds of holes. I mean, I wouldn't want to limit it to any specific number of holes, like I say, every model might have one hole, another model might have 15 or 20 holes.

Q. Getting into Plaintiffs' Exhibit A, I wonder whether or not you had occasion to reexamine the machine or to refresh your recollection so that you know now whether that machine is properly operating? A. That machine is not properly operating.

Q. And in what way is it not properly operating? A. Well, because the scores aren't—like I said yesterday, those scores, when they go through a cycle, those scores should always set, and it doesn't appear to me, without getting into the machine, that the scores aren't right. Like I said yesterday, I didn't intend when I brought it down here, I didn't intend for the score, the score was one purpose, but it was an amusement machine, that it didn't release any money or checks or anything else, that wasn't the main object of the machine.

Q. Now, then, are those machines very sensitive, subject to being out of kilter, such as you indicated this machine is now? A. Sure.

Q. Now, then, have you lost any of these machines that were put out in the stores or place of business of the merchants?

Mr. McLeskey: I will object to the question.

The Court: Yes. What relevancy has that?

Mr. McLeskey: No limit to the time.

Mr. Leach: That I don't believe has any particular relevancy, but it is leading into something that I believe would be relevant.

Mr. McLeskey: No limit as to time at all; might have been back when they weren't even regulated.

The Court: Somebody might have stolen them. What difference does that make?

Mr. Leach: Well, if the Court please, that can be brought out in further questions. I will withdraw the question.

Q. To your knowledge, have any of the merchants with whom you have contracts been arrested in the last year?

Mr. McLeskey: I object to the question.

Q. (continuing) for operating one of your devices for gambling?

Mr. McLeskey: I object to the question.

The Court: Yes, I will sustain that. Now, if you want to show that they were ever arrested for gambling, that is a different proposition.

Mr. McLeskey: And convicted.

The Court: What?

Mr. McLeskey: And convicted.

The Court: Yes, but simply—

Mr. Leach: If the court please, that is the question I asked except I didn't add "convicted".

The Court: Well, I know, but for what purpose; simply having been?

Mr. Leach: No, sir. Would you mind reading my question?

The Court: That is what we are to decide, whether or not it is unlawful to have them.

Mr. McLeskey: That is up to the court.

The Court: If they were using them for gambling purposes, that is one thing, but if they were using it, as the testimony was up to now, just for amusement; the fact somebody was arrested for a violation of the ordinance is

a negative question. We are here to determine whether the ordinance is valid or not, not what has been done affecting the ordinance here before.

Mr. Leach: I wonder if you would read the question back just for my information. I want to know what I asked him.

(Last question read.)

Mr. McLeskey: I am still objecting to that.

The Court: Yes. That is not a proper question.

Q. Mr. Windmiller, during the past year, to your knowledge, have any of the merchants with whom you have contracts been arrested and convicted for gambling in relation to one of your machines?

Mr. McLeskey: Object to the question.

The Court: I am going to let him answer that.

Mr. McLeskey: Note an exception. Within the past year, now, you mean—

Mr. Leach: The past year?

Mr. McLeskey: Yes.

The Court: If you know.

The Witness: If I know, I will answer it this way. I thought about it a long time last night. I thought you might ask me that question, and I have examined it to the best of my ability, and I will have to answer no.

Q. All right, sir. That would take it back to October of 1954. I will ask you whether in the preceding year—

Mr. McLeskey: Object to the question.

Q. (Continuing) that happened?

Mr. McLeskey: Object to the question.

The Court: Yes, I will sustain it.

Mr. Leach: I have no further questions.

Mr. McLeskey: That is all, Mr. Windmiller.

Louis Wilson,

called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Examined by Mr. Sherwood:

Q. State your name to the court. A. Louis Wilson.

Q. Where do you live, Mr. Wilson? A. 705 Montrose avenue.

Q. And what business are you engaged in? A. I operate the Carolyn Night Club, and I am also in the music publishing business, and I have a record business known as the Carolyn Record Company.

The Court: I didn't get the name?

Mr. Sherwood: A little louder. Carolyn—

The Court: No. Your name.

The Witness: Wilson.

Mr. Sherwood: Did you get the name of the business?

The Court: Yes.

Q. Now, in connection with the operation of your business, Mr. Wilson, do you employ the use of any pinball games? A. Yes, sir, we do.

Q. About how many and for about how long a period of time have you had them? A. I have had the club close to three years, and over that period of time had vending devices of this kind.

Q. During that entire time? A. Yes.

Q. Will you explain to the court from your experience with the pinball games why you have them in your business? A. My establishment—

Mr. Leach: I think I'd better object to that question.

The Court: Let him answer.

The Witness: Is it all right?

Q. Go ahead. A. My establishment is primarily a place of entertainment, dancing and more or less a night club. We have name bands and between sets that the bands play, why, we have these, we have the juke box for entertainment, we have a shuffle—what is known as a shuffle alley, and one time we had another machine, I forget now what it was, a bowling machine. We keep changing them to keep the customers and between sets as a form of entertainment for them, relaxing for them.

Q. And what reward do your customers receive for playing these games, if any? A. What do you mean by "reward"?

Q. Explain to the court how the games are played. That might be the simplest way. A. It is a coin-operated machine, they put in a dime and they bowl, and the bowling machine gives about ten frames, and when the last frame is over, it automatically cancels out, and says, "Game is over," and that is all.

Q. And how about the pinball games? A. The pinball, at least we have a machine there with five; you put in a dime and five balls would come up, and you try to get them in various locations. I believe there is holes there, and when it is all over, why, that was it.

Q. They make a score? A. They make a score or bells would ring, and one thing and another.

Q. Well, did the machines return anything other than amusement to the player? A. Oh, no.

Q. And did you, in your operation of these games, at any time pay anybody off? A. I never paid anybody in all the time I have handled the machines.

Q. And did any of the machines themselves return anything such as checks or coins or tokens or merchandise for

playing? A. No. That was one of the reasons I handled the machines; they take up a little space, naturally, and I would get a commission on the income from the machine, but we never returned anything, and it was a form of entertainment for the customers, primarily it was to keep the customers there, because after a band plays 40 minutes there is a lull, and it gives the customers something to do.

Q. What is your contract and with whom do you have a contract, Mr. Wilson? A. I have, I believe it's Modern Music, and they give me 50 per cent of the income.

Q. Has the game or games been profitable; have they made a profitable return even though being played for amusement only? A. Well, to be frank with you, between the juke box and the shuffle alley and the cigaret machine and the various vending devices in the lavatories, such as hand lotions, perfume and various things, it almost pays my rent.

Q. Well, from your observation in this length of time, Mr. Wilson, in operating these games, what can you tell the court about their tendency to encourage gambling?

Mr. Leach: I am going to object to that question.

The Court: Yes, I will sustain that.

Mr. Sherwood: That's all.

The Court: Cross examination.

Cross Examination

By Mr. Leach:

Q. Mr. Wilson, you testified with relation to a lot of different types of machines, cigaret machines, juke boxes, shuffle alleys and so forth. Now, confining yourself to pinball machines, what have you had in the Carolyn Night Club in the last three years of a pinball nature? A. We have a machine there which was called a bingo game.

Q. Is that the only pin game you have had? A. That is the only pin game I have had.

Q. And when did you have that? A. When I first took over, which was, I believe, in 1953, in April.

Q. Do you know who, by name, is in charge of the Model Music Company? A. The Model Music Company?

Q. Well, you said your contract was with the Model Music Company? A. Modern, M-o-d-e-r-n.

Q. Do you know who is in charge of that company? A. Well, the various boys that checked the machine and come in an average of once a week, and the same people that change the records, count the money in the machine. Well, I know Maxie, Louie and Frank, the various boys come in and check the machine. I don't know them intimately.

Q. You still have that bingo pinball game at your establishment? A. No, no, it wasn't taking in enough.

Q. When did you take it out? A. Oh, about four or five months after I bought the place. They didn't play that as much as they played the shaffle alley. The shuffle alley was more lucrative.

Q. Now, you testified there was absolutely no payoff on any of these machines, is that correct? A. Yes, the only time, if someone would put in a quarter in the juke box and it didn't work, you would naturally refund their money. Sometimes a record gets stuck or something.

Q. Did this pinball machine give free plays? A. No.

Q. If you got a certain high score? A. No.

Q. Was there any conversation between you and the owner of the machine with relation to free scores? A. To be real frank, I used to serve 130 lunches there, we have a cafeteria, and while they were waiting for the others to finish, they would play a few games, and go back to work.

Q. Now, the shuffle alley and the juke box pay their own way, in effect; you still have those, I take it, is that correct? A. Yes, sir.

Q. And this pinball game which you operated without payoffs you took out four or five months after you bought the business; that is correct, isn't it? A. Well, the machine, they weren't playing that as much as the shuffle alley. The shuffle alley was something new, and they do take up space.

Q. Well, am I correct in stating that you figured it wasn't worth the money to keep the pinball machine in? A. At that time it wasn't worth the money.

Mr. Leach: I have no further questions.

Redirect Examination

By Mr. Sherwood:

Q. You don't have one right now, then? A. What, the pinball?

Q. Pinball game? A. No.

Q. I thought you did? A. Just the shuffle alley.

Mr. Sherwood: That's all.

George W. Connor,

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Examined by Mr. Sherwood.

Q. State your name to the court. A. George W. Connor.

Q. Where do you live, Mr. Connor? A. 5726 Andover street, Worthington.

Q. And what is your business? A. Oil and gas service, wash and garage.

Q. Where is your business located? A. 658 North Park street.

Q. What is your company name? A. Connor's Sohio.

Q. Is that the corner up there just beside the White Cross Hospital? A. Yes.

Q. Across from the park? A. Yes.

Q. How long have you operated your business there, Mr. Connor? A. 14 years for myself, 13 for the company.

Q. What class of patrons do you have? A. About 55 per cent, 55 to 60 per cent professional, about the balance it would be just neighbors, doctors, attorneys.

Q. Now, in connection with the operation of your business, Mr. Connor, do you have a pinball game? A. I do.

Q. And how long have you had that? A. Seven to eight years.

Q. What is your chief reason for having that game in your business? A. Well, the main reason I put it in, first, while we were working on cars, people would play the game and kind of hold them still; give them something to do until we got the work done.

Q. Has any game or games that you have there in connection with your business ever given any return to the customers who play it? A. No, sir.

Q. What do the customers receive from playing the game? A. Well, the only thing they get is five balls, and a high score.

Q. Does each player who plays the game receive the same? A. The same amount of balls?

Q. Same amount of balls. A. Yes.

Q. Is the operation of the pin game in your business there strictly for amusement? A. Yes.

Q. Has that been profitable? A. It's doing all right for what space it takes up. Yes, it runs about $8 or $9 a week.

Q. Is that your share? A. That is my share. That is on a 50-50 basis.

Q. I was going to ask you what kind of contract you had. A. 50-50.

Q. From your years of operating a business there and having a pinball game, give the court your opinion as to whether or not that cause idling and loitering. A. Not in my place, it hasn't been. I have never been—most of the people that play it play it while I am working on their cars or waiting on them.

Q. Has any game or games that you have had in there, Mr. Connor, given any free plays or payoffs in the way of checks or return of any kind? A. No, sir.

Mr. Sherwood: I guess that is all.

Cross Examination

By Mr. Leach:

Q. With whom is your arrangement for this pinball machine? A. You mean with whom I have it with?

Q. Yes. A. Mike Cherry.

Q. Have you ever talked to him or anyone working with him with regard to free plays on that machine? A. This morning is the first time I have met Mr. Cherry.

Q. Well, who had you dealt with previously? A. The repairmen.

Q. Have they ever mentioned free plays? A. They was never on the machine. It was a board game.

Q. Have you ever been around the lot when that machine was operated by two or three people? A. Yes.

Q. Have you witnessed any gambling by those people on the machine? A. Oh, no, no. Maybe a cup of coffee, maybe bet on a high score for coffee; that is all I ever seen.

Q. Does that happen a lot? A. No, very rare.

Q. Where they bet a cup of coffee? A. No.

Mr. Leach: I believe no further questions.

Redirect Examination

By Mr. Sherwood:

Q. Do doctors up at White Cross play those for recreation? A. Yes, and one time had a minister play it, Reverend Richards.

Q. Don't mention any names. A. He used to come over there to play for recreation.

Q. The only reason I asked you that, I think you told me when I talked to you about your operation, that you had a psychiatrist come over there? A. Yes, he plays a good bit. He hasn't in the last—oh, 11 or 12 months, because he has been transferred out to Kansas City.

Q. Incidentally, Dr. Richards was the head of the hospital at that time, since you mentioned it?

Mr. McLeskey: Was that a fact, he was head of the hospital?

The Witness: Yes.

Mr. Sherwood: That is all.

Mr. Leach: That is all.

The Court: Who is next?

Norman B. Cook,

called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Examined by Mr. Sherwood:

Q. Will you state your name to the court, please? A. Norman B. Cook.

Q. Where do you live, Mr. Cook? A. 6997 Harrisburg pike, Orient, Ohio.

Q. And what is your business? A. I am co-owner and partner of a laundromat-equipped half-hour laundry, located at 62 Parsons avenue.

Q. How long have you been in business, Mr. Cook? A. In that business since October of 1948.

Q. In connection with the operation of your business, do you in your establishment have what is known as a pinball game? A. Yes, sir.

Q. And can you tell the court your chief reason for having that? A. Well, in our business it's self-service laundry and the women and the gentlemen also who bring their clothes there and do them themselves usually spend from a half hour to an hour and a half there while their clothes are being washed and dried, and the pinball machine and magazines and such are more or less sources of amusement and take up their time while being there while clothes are being washed, which takes about 35 minutes, they have nothing to do.

Q. That gives them amusement during that period of time? A. Yes, sir.

Q. You might tell the court how your machine is played and whether or not each person who plays it receives the same play for the same amount of money. A. Well, it has five balls, it is played for scores and such for five cents. There are different little holes and things to try to get the balls in, and try to run up a high score and get different lights out.

Q. Does the machine or machine you have had, Mr. Cook, or you, yourself, pay any return to the customers? A. No, sir.

Q. Who play the machine? A. No, sir.

Q. You or the machine give no free plays? A. No free plays, no reimbursement or anything whatsoever, sir.

Q. From your experience with the pinball machine in your place of business, Mr. Cook, can you tell the court

whether or not it encourages idling and loitering? A. No, sir, it does not, and our particular place of business, our clientele are mostly older people, and by "older" I mean about 21, people with families and such or maybe bachelors, and they stay only about the time to take care of their laundry.

Q. Has the operation of the machine for amusement only been profitable? A. Yes, to an extent. It isn't played too much. As I said, most of our customers are women, some of them go over there and play for a little amusement, but it helps pay a heat bill or water bill.

Q. With whom do you have your contract? A. Well, I don't have a contract only more or less verbal with Mr. Windmiller.

Q. What is your agreement? A. He has to keep the machine serviced and in workable order, empty it, I mean empty the contents.

Q. And for that how do you arrange the money that the machine takes in? A. 50-50. He gets 50 per cent, we get the other 50 per cent.

Mr. Sherwood: That is all. Cross examine.

Cross Examination

By Mr. Leach:

Q. Do you know, Mr. Cook, whether or not this machine can be converted by a device within the machine itself to a free play type machine? A. That I do not know. As a matter of fact, I don't know how they mechanically operate, anyhow.

Q. Do many children bring laundry in your establishment? A. We don't get one child out of—well, by "child", I mean under 21, we don't get one out of 150 customers. Occasionally some children come in with their parents, but we have never had any operate the machine.

Q. You stated you lived in Orient and operate this business at 62 Parsons. Are you present at 62 Parsons the normal part of the business day? A. Yes, sir.

Q. Are you, or do you work in such a way that you are generally around the machine? I mean, at least it is under your eye? A. Well, either myself or my business partner are always there while the store is being operated except for an occasion such as this when I am down here.

Q. Well, you have seen this machine played quite frequently, I take it? A. Yes, sir.

Q. And do people congregate around that machine on occasions? A. Never more than two or three. There are never large crowds of people in the place, I mean at one particular time.

Mr. Leach: We have nothing further.

Mr. Sherwood: That is all. Thank you, Mr. Cook.

Ruth Craig,

called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Examined by Mr. Sherwood:

Q. Would you state your name to the court, please? A. Ruth Craig.

Q. And where do you live? A. At the Union—where do I live?

Q. Where do you live, Mrs. Craig? A. 74 East Lake avenue.

Q. And with whom are you employed? A. Union Depot Company.

Q. How long have you been so employed? A. Almost 14 years.

Q. What position do you occupy there? A. I am cashier.

Q. Now, in connection with the operation of the Union Depot, which is the Union Depot Company, then, I believe, is that right? A. Yes. I am in the ticket office, cashier.

Q. And does the company, in connection with their operation, have a game room at the Union Depot? A. Yes, sir.

Q. Will you explain briefly to the judge what that is? A. Well, it is just a game room where we have pinball machines that are not—there are no games pay off on these machines, it is for amusement only and there is no one there to take payoff on them, you know, so it is just for amusement, no payoffs or no free games.

Q. I was going to ask you if they had free games. A. No free games.

Q. How long have you operated the game room, Mrs. Craig? A. Well, it has been—we have had a machine there ever since I have been there, so—

Q. About how many machines or games? A. Well, now, let's see.

Mr. Leach: I am going to object to that. There are various games.

Mr. McLeskey: The extent of the operation.

The Court: Yes. Go ahead.

The Witness: I think there are 10 to 15.

Q. And are they all in one room? A. Yes, they are.

Q. Now, with whom do you have a contract, Mrs. Craig? A. Well, contract—

Q. Or agreement as to the operation of this machine? A. Well, the owner that comes has an agreement with the Depot Company.

Q. You can tell the court who that is. A. Mr. Windmiller.

Q. And what is the nature of your agreement? A. Well, that I couldn't say. We get one-half.

Q. That is what I mean. A. We get one-half of the proceeds on the machines.

Q. Income from the games? A. Yes.

Q. Now, during all that time that your company has had the game room and operated the game up there, have you ever paid off any return or reward of any kind in the form of money or checks or tokens, merchandise? A. No.

Q. To any player of the game? A. No.

Q. And have any of the machines been so constructed that they could make a payoff? A. No, there never has been as long as I have been there, and they had machines, there has never been a payoff or free game.

Q. You might explain why you have a game room and the games up there. A. Well, it's just a pastime for the travelers going through the depot, which so many of them have an awful long wait, and it gives them a little entertainment which there is none in our depot; some depots have theaters and there is nothing there, and it just gives them a little pastime.

Q. And from your years of experience in handling these games up there, Mrs. Craig, what can you tell the court about whether or not they cause idling and loitering? A. There is no idling or loitering, because we have depot police that will not permit loitering, and there is no seats in the game room, the seats are all out in the station proper and the game room is so constructed that anybody can see in from two angles, and there is no loitering.

Q. Has the operation been profitable as an amusement? A. Well, I would say so. I mean, I think it has been.

Q. The company is satisfied with it? A. Yes, they seem to be.

Mr. Sherwood: Thank you very much. Cross examination.

Cross Examination

By Mr. Leach:

Q. Is this game room an entirely separate room? A. Yes, it is, but it is not away from any—anyone can see it passing by. You can see in it; it is not enclosed, because there is no doors about the openings.

Q. You mentioned that you are the cashier at the ticket office. Now, where is that ticket office located with relation to the game room itself? A. It's just very close. I would say the ticket office is—I mean the game room is just back of the—I mean, going into the depot from High street, you just go right past the ticket office and right back into the game room.

Q. Are you in the ticket office where tickets for railroad passage is sold? A. That's right.

Q. Are you behind a sort of a cage? A. That's right.

Q. And if you were to stand and look out on the cage, you would be looking north, wouldn't you? A. That's right.

Q. And where is the game room located? A. East.

Q. With relation to the cage? A. East.

Q. East? A. That's right.

Q. Do you manage or have control of the game room? A. No, the secretary of the the depot—I mean, there is really no manager of the game room, the secretary signs the contract, the contract was signed with him, and when they come in and empty the machine, I always take care of it, go with them and help count the money.

Q. Let me ask you this, are you located or have you watched on numerous occasions the operation of these machines by travelers? A. Oh, yes, I have done that.

Q. Do the players tend to congregate around the game? A. No.

Q. Have you ever seen gambling on those machines by the persons themselves? A. No.

Q. You have never? A. No.

Q. Yet you are in there quite frequently? A. Yes, I pass by between three and four times a day, and then I always pay particular attention to them to see, you know—

Q. Well, you pass by them two or three times, but are you in the room on occasions? A. Not too often. I go in to see that the machines are all right.

Q. Never seen a game used for gambling between two persons? A. No.

Mr. Leach: All right. That is all.

Mr. Sherwood: Thank you very much for coming down.

Mr. McLeskey: That is all.

The Court: Who is next?

Mr. McLeskey: Why, we have another witness who is not here, so I believe we will call Mr. Ferguson.

Gerald Ferguson,

called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Examined by Mr. McLeskey:

Q. State your name to the court. A. Gerald Ferguson.

Q. And where do you live, Mr. Ferguson? A. 2551 Grandon road.

Q. And what is your business, if any? A. In the operation of coin-operated machines.

Q. How long have you been in that business? A. Oh, around eight years.

Q. Do you in that operation have any pin games or pinball machines? A. Yes, we do.

Q. What else do you have besides pin games and pinball machines? A. We have shuffle alleys, shuffleboards. Pool tables, guns, various other games.

Q. Do you have pool table games, too? A. Yes, we have pool table games.

Q. Do you have all those games out on contract with merchants? A. We do.

Q. How many pinball games do you operate, Mr. Ferguson, approximately? A. Oh, I would say no more than a dozen.

Q. A dozen, and those machines are worth approximately what? A. You mean just the pinball machines themselves?

Q. Yes, just the pinball machines. A. Oh, I would say in the neighborhood of five, six thousand dollars.

Q. What is the value of all your machines that you operate, approximately?

Mr. Leach: Objection.

The Court: Overruled.

The Witness: I would say $50,000.

Q. Now, let's take these at the time these ordinances went into effect under licensing. Before these city ordinances were passd in 1947, how many pinball machines did you have, Mr. Ferguson? A. Oh, I would say in the neighborhood of 20, 25, I guess.

Q. 25. After the city ordinances were passed, city ordinances passed in 1947, regulating pinball machines, that is Ordinance 45-55, under regulation did your number increase or decrease, do you recall?

Mr. Leach: Excuse me. What was that ordinance?

Mr. McLeskey: I have it 54-55, maybe I am wrong. It's the licensing ordinance.

Q. Under licensing by the city of Columbus, did your business increase or decrease? A. Increased.

Q. What is the fact as to whether or not you were encouraged by the city of Columbus—

Mr. Leach: Objection.

Q. (Continuing) —to engage in this business?

The Court: Oh, yes, I will sustain that.

Mr. McLeskey: All right. Note an exception. Let the record show if the witness were permitted to testify he would say he was encouraged.

Q. Now, let's come down to April 10, 1953, when the first two prohibitory ordinances were enacted, that is 156-53 and 157-53; at that time approximately how many were operating, Mr. Ferguson? A. Oh, I would say around 20, 25.

Q. 25. Now, since that time has your number increased or decreased? A. Decreased.

Q. Why? A. Due to the fact that the merchants are afraid to install a machine in their place of business, not only as far as the pinball machine is concerned, but any other type of device that has an automatic scorer such as shuffleboard, shuffle alleys, such items as that.

Q. You say merchants have been afraid. Have any of your customers told you that? A. Yes.

Mr Leach: Objection.

The Court: Overruled.

Q. How many would you say have told you that they were afraid to use these machines because of these ordinances? A. Well, I couldn't give you a specified amount. I would say over a couple of years it has been quite a few.

Q. Were you present on the evening when the first two ordinances here, 156-53 and 157-53, that is, they became effective on the tenth of April, 1953; were you present out in the hall when a conversation took place between Mr. Windmiller and Mr. Don Cook, who was safety director? A. Yes.

Mr. Leach: Object.

Q. What was that conversation, if you recall?

Mr. Leach: Object to that line of questioning. The ordinance was passed.

The Court: I know. Go ahead.

Mr. McLeskey: We make the allegation that we were threatened and so forth and so on, and you will not admit that.

Mr. Leach: Well, if the court please, the allegation of threats or two ordinances, now, this conversation was even before the ordinance.

Q. Did this conversation relate to the ordinance, Mr. Ferguson? A. Yes, it did.

Q. And was it about the time the ordinances were under consideration? A. The same evening.

Q. And about the time the ordinances were passed, is that right? A. That's right.

Q. Was it the night the ordinances were passed, if you recall? A. I can't answer that. I don't know.

Q. Now, what was that conversation? A. Well, Mr. Windmiller and myself were standing in the hall in city hall at the council chambers, Chief Harrison was the chief of police, and Don Cook, safety director, came out of the mayor's office and went into the council chambers; we had occasion to talk to them, and Mr. Cook made a statement to Mr. Windmiller and myself, as far as our business was concerned he was going to run us out of business.

Q. Was Mr. Windmiller standing there? A. Yes.

Q. Did he say anything to him at that time? A. No.

Q. Your conversation was only with Director Cook? A. Director Cook, yes.

Q. In these machines that you operate, these pinball machines, what is the fact as to whether or not each player receives a number of balls for his nickel? A. Each player receives the same amount of balls for a nickel.

Q. What is the purpose of these machines; what is the object of the play? A. Well, the object of the machine is for amusement.

Q. Now, what if anything does the score have to do with the game, is what I am getting at? A. Well, nothing other than just a man gets amusement out of running up a high score.

Q. And if two players are playing, what is the object of the play ordinarily? A. Well, it is competitive play.

Q. Do these machines of yours release any merchandise, checks or tokens? A. None whatsoever.

Q. Release any free plays? A. No.

Q. What is the return of the player for his nickel, if anything? A. Just satisfaction of playing the machine.

Q. Playing the machine? A. Yes.

Q. Now, would you say that these machines that you have seen demonstrated here, or the machines which you operate, does the success in the playing of that machine depend upon chance or upon skill? A. Skill, I would say.

Mr. Leach: Objection to that question.

The Court: Overruled.

Q. Are there, to your knowledge, skilled players of these pinball machines? A. Quite a bit.

Q. Quite a bit? A. Yes.

Q. How do they gain that skill, Mr. Ferguson? A. Well, I imagine through continuous playing the machine.

Q. Continuous playing of the machine? A. Yes.

Q. Would you say that the score that a player may run up depends upon the skill of that player or not? A. That has a great deal to do with it.

Q. What is the skill feature of these machines primarily, if you know? Are you a skilled player, Mr. Ferguson? A. Absolutely not.

Q. Do you have some fairly well working acquaintance with the machine? A. A little.

Q. You don't call yourself a skilled player? A. No, I don't.

Q. Let's take this free play mechanism you heard talked about. How difficult is that mechanism to put on and take off a machine or change, Mr. Ferguson? A. Well, it's quite a job. As a matter of fact, it is the type of job that any individual can undertake.

Q. Can you do it? A. I could, but it would take me quite a while.

Q. How long would you say it would take the average mechanic? A. That is, to remove and replace?

Q. To remove and replace. A. I would say in the neighborhood of four or five days.

Q. Does it take a trained mechanic to perform that kind of a job? A. Yes, it does.

Q. What is the fact as to whether or not it takes a trained mechanic to even repair these machines when they get out of order? A. What was that question?

Q. Does it take a trained mechanic to even repair these machines when they get out of order? A. It does.

Q. From your experience, Mr. Ferguson, in the operation of these machines, can that operation for amusement only be done at a profit? A. Yes.

Mr. Leach: Objection.

The Court: Overruled.

Q. What would you say as to whether or not these machines tend to encourage gambling?

Mr. Leach: Objection.

The Court: Overruled.

The Witness: I didn't quite get that, Mr. McLeskey.

Q. What would you say as to whether or not these machines tend to encourage gambling? From your experience now, do they or do they not tend to encourage gambling? A. Absolutely not.

Q. From your experience in working with the mechanism of these machines, would you say that they are readily convertible from amusement to gambling device? A. No, they are not.

Q. From your experience, would you say that they encourage idling or loitering around the place where they are played? A. No.

Mr. Leach: Objection.

The Court: Well, he has answered. It may stay in.

Q. Now, Mr. Ferguson, in the third ordinance, which is the last one, they specifically refer to table games, specially banning, specifically banning pinball games. Are pinball games the only games that are played on the table? A. No.

Q. What other games can you name that are played on the table? A. Well, practically every game that is made is considered a table game; they have legs.

Q. Can you name some of those games? A. Shuffleboard, shuffle alleys, bowling alleys.

Q. The first two ordinances purport to ban any games that register a score. Do all the table games register a score? A. Yes.

Q. Let's forget the table games. Let's take other games like bowling alleys and football and baseball games. Do these sports register scores? A. Yes, they do. As far as the game itself is concerned, it does not.

Q. But can you gamble on these games of football? A. I have.

Q. You've bet on football games? A. Certainly.

Q. Baseball? A. Right.

Q. Basketball? A. Right.

Q. Bowling? A. I am not a bowler.

Q. You are not a bowler, but you bet on these other games? A. Yes, sir.

Q. Substantial bets or just— A. Oh, just—

Mr. Leach: Objection.

The Court: Yes. I don't think that makes any difference.

Mr. McLeskey: I just want to get that in the record, because we are claiming a denial of equal protection, both as to the first ordinance and the third ordinance.

Q. Now, on these games that you have, Mr. Ferguson, are there any labels on these games? A. Every game you have is labeled.

Q. And will you repeat in substance what that label is? A. The label reads, "No one under 18, no free plays, no moneys, prizes or tokens, amusement only."

Q. Does it specify any age limit? A. Yes, you must be 18.

Q. Must be 18? A. Yes.

Q. Mr. Ferguson, after the Court of Appeals in Case No. 1, here, which is the earlier case, I will give you the number of it so we will know what we are talking about, Case No. 187,169, after that judgment was entered in this court and had been reversed by the Court of Appeals, then the third ordinance, that is, No. 1615-54, was enacted as an emer-

gency measure, were you given any opportunity to appear and make any objections to that ordinance? A. No.

Mr. Leach: Objection.

The Court: Overruled.

Q. Were you given an opportunity to be heard? A. No.

Q. When the first two ordinances were passed, were you operators given an opportunity to be heard before those were passed, Mr. Ferguson, if you recall? A. Just how do you mean by "given an opportunity"?

Q. Well, did you appear before a committee of council and given an opportunity to object to the ordinance? A. I did not, no.

Q. Were you given such an opportunity, do you know? A. Not to my knowledge.

Q. Just one or two other questions now and I will be through. Just refreshing your recollection, Mr. Ferguson, do you recall whether or not you were among the group that went over to council with Mr. Sherwood? A. Yes, I believe I was. When I think of it, I believe I was.

Q. At the time those first two were enacted? A. Yes.

Q. Do you recall whether or not you and Mr. Sherwood were given an opportunity to appear before the committee, if you recall?

Mr. Leach: I am objecting to that question.

The Court: Well, it won't do any harm.

Q. If you recall? A. Yes, I believe there was something said about it.

Q. But you are positive that you were given no such opportunity on the third ordinance, the last one? A. Absolutely not.

Q. None whatever? A. No, sir.

Mr. McLeskey: Cross examine.

Cross Examination

By Mr. Leach:

Q. Have you ever appeared before city council with regard to any legislation other than this, for example? A. How do you mean that?

Q. Well, I mean has council passed any other ordinance that you were interested in so that you went down to council chambers? A. No, there was no other ordinance I was concerned about.

Q. Now, you stated, I believe, after you went back over it, that you were given an opportunity to be heard on the passage of these first two ordinances, is that correct? A. I believe that is correct, yes.

Q. Were you given an invitation to appear? A. No.

Q. What do you mean by your statement that you were given an opportunity to be heard? A. Well, I believe—what do you call him, a clerk of courts, that gets up in front of the council and asks if anybody has anything to say concerning this type of ordinance or that type of ordinance? I believe that is what took place that night.

Q. Do you know when the third ordinance was passed, the one specifically mentioning pinballs; that meeting was held openly? A. You say do I know?

Q. Yes. A. That I don't know.

Q. Did you attempt to be heard upon that ordinance? A. I didn't know it was coming up. In other words, they just slammed the door in our face.

Q. Would you say this is a correct statement, nobody kept you from saying anything at the time on any of these, but you didn't know the third pinball ordinance was pending? A. That is correct.

Q. All right. Now, you have stated, I believe that none of your machines have free plays, is that correct? A. That is absolutely true.

Q. Have they ever? A. Never.

Q. You get these machines direct from the factory or— A. No. We would buy from a distributor who is a factory representative.

Q. Is the machine actually taken to the distributor and then over to you? A. Well, either way; we pick it up or they bring it to us.

Q. When these machines are delivered to you, do they ever have a free play mechanism on them? A. Well, as a matter of fact, I don't pay much attention to it, because we don't use it.

Q. Well, if you don't use it, you have to pay attention and take it off? A. As far as free play is concerned?

Q. Yes. A. Naturally, if we don't use it, it is taken off.

Q. You have to look to see if it is? A. I instruct the distributor at the time it's a game without free play.

Q. Has that always been the situation? A. As long as I have been in business, yes.

Q. You, then, I take it, never had in your possession a machine that did give free play? A. Well, I couldn't answer the question due to the fact there may be a machine laying around the place that does have a free play, but to my knowledge I could say I know of a machine that had free plays on it.

Q. I say, to your knowledge, do you know if you ever possessed a machine giving free play?

Mr. McLeskey: Object.

The Court: Yes. As far as you know.

The Witness: As far as I know, I don't have a free play machine.

Mr. Leach: I don't mean to be going behind the court's back, but I will try it again.

Q. You said, now, to your knowledge, you have no such machine. I am asking you to your knowledge have you ever had such a machine?

Mr. McLeskey: I think that is objectionable. It covers too much ground.

The Court: In other words, it is the same question I asked. As far as you know, you never had it?

The Witness: Right.

Q. You understand the question? A. Yes.

Q. These machines have registers on them at all? A. Some do, some don't.

Q. Some kind of meter or register? Would you describe those that do contain such a device? A. Well, it's a meter that is inside the machine.

Q. Can you see it from the machine? A. No, the machine I have, you can't see it.

Q. Is that a number machine that keeps turning? A. Yes.

Q. What does that register? A. I don't know; I don't use them.

Q. You don't know? A. I don't use them.

Q. I know you don't use it, but you don't know? A. Well, as far as the register itself was concerned, I was never interested in it, due to the fact I never had any use for it, so I don't know actually what the function of it is.

Q. You are telling me you don't know the purpose of the register? A. I have seen them, yes, but I say I was never interested in the fact to find out what it was.

Q. So we understand each other, you are telling me you, today, don't know the purpose of a register in a pinball machine? A. Like I mentioned before, as far as my being familiar with this machine, I am not, because I am not a mechanic.

Q. That might be, but I want a direct answer to my question, do you know the purpose of a register in the pinball machine? A. Like I said before, I know it is there. The purpose of it I can't say one way or the other.

Q. You do not know? A. Well, in my machines I have, like I say, I don't know what it is there for, I never use it.

Mr. Sherwood: Maybe you'd better enlighten us, Russ. I don't know what a register is. I don't know, myself.

Q. Well, would you tell the court what you know about the register? A. Like I mentioned before, it has a register inside the machine. At one time, the machine we used to have, in order to prevent theft, as far as your collecting is concerned, each time you put a nickel in the machine it registered like a cash register; you could take a meter reading on it and you could tell as far as the money in the machine—totalizer, I would say.

Q. You say that was some time ago that you had that? A. Yes.

Q. Well, you stated you presently have machines containing registers. Do those registers score or total up each time a nickel is put into the machine? A. That I don't know. Like I said, I don't use it.

Q. Did you use the old type device? A. Well, at one time, if you had any suspicion as far as your help was concerned, yes.

Q. Haven't you had any suspicion recently? A. No, sir.

Q. I think you testified, but I don't remember your answer, how long would it take to convert a machine from free play to non-free play? A. Well, if it wasn't myself that had to do it, it would take me quite a while.

Q. Well, if it were one of your trained mechanics, how long would it take? A. That is a day in order to remove the free play mechanism, as you say, and put it back in again.

Q. To your knowledge, can a machine be changed from free play to non-free play by a means other than taking out the entire mechanism? A. To my knowledge?

Q. Yes, sir. A. I can't say that, because I am not a trained mechanic.

Q. You do know about the fact that some machines have free play devices on them? A. I have heard of them.

Q. Have you ever taken one off? A. Myself?

Q. Yes? A. No.

Q. Now, you stated that you own and operate other machines than pinball, and you, I believe, mentioned bowling, shuffleboard, and what have you. Would you tell the court, in your opinion, the relationship between skill and chance in the bowling alley? A. Well, I would say that the bowling alley is on the same principle as the pinball: it is skill.

Q. That wasn't my question. Well, perhaps it was. You say it is perhaps all skill on the bowling alley? A. Yes.

Q. You would say that the skill is 100 per cent of the pinball machine? A. Well, it is. I would say that, depending on the player himself.

Q. Do you have occasion to see these machines in operation? A. Occasionally.

Q. Where are your machines located? A Throughout the city of Columbus.

Q. Would you give us a resume, to the best of your ability, as to locations?

Mr. McLeskey: Object. Just a moment.

The Court: Oh, now, give one or two. Why do you want that?

Mr. Leach: If the court please, I am not interested in the location by address, I am interested in the type of establishment.

The Witness: The type of establishments?

Q. Yes. A. Cafes, restaurants, I don't have any confectioneries, but I would sty the bulk of our business is in restaurants and different cafes throughout the city.

Q. Will you describe for the court the various types of pinball games that you have, and I don't mean in complete detail, but we have one sitting over there, Plaintiffs' Exhibit A, would you tell the court some of the machines that you have that are actually a little bit different than that machine? A. They are all built along the same lines. I believe you will find they all have a scoring mechanism, as far as high score, different flippers and rollers, there is lights are situated differently, one has more holes than another, but actually they are all manufactured on the same basis.

Q. Have you ever seen the machine out in the hall? A. I see one setting out there, yes.

Q. Will you say that that machine and this machine are substantially the same? A. I would say they are about altogether the same way, yes.

Q. They would both, then, be representative—well, let's say this, they would be representative of pinball machines, either one of them? A. Yes, sir. They are in the same class.

Q. Have you ever gambled on a pinball machine? A. Have I?

Q. Yes. A. No, I never gambled on one.

Q. Have you ever seen gambling on pinball machines? A. Never have.

Q. Have you any machines such as Plaintiffs' Exhibit A, yourself? A. Of that type?

Q. Yes. A. I believe there might be one or two sitting around.

Q. Are you familiar with the scoring arrangement on the machine that you own of a similar nature? A. Not too familiar, no.

Q. Well, what I would like to ask you is this, in this particular machine, Plaintiffs' Exhibit A, on the backboard is a score called "Visitors' score", in your machine having such a similar background, is that visitors' score changed as you progress through the game, or is that visitors' score set when you deposit the nickel? A. I can't answer that question because I don't have that type of machine at all. How that machine operates I can't tell you.

Q. Do you have any machine which, upon the placing of a nickel, automatically register any type score on the background, backboard? A. As far as I can answer that question is this, as you insert a coin in any type of machine, all the scores drop back to zero unless there is something wrong with the machine. As far as the machine is concerned, from what was said here, that machine must be out of order.

Q. Are you familiar with the Bingo-type pinball machine? A. I have seen them. I am not familiar with them.

Q. Mr. Ferguson, you, I believe, purchase the machine and then put it out in the hands of a merchant under a

contract. After that machine is placed in the hands of a merchant, what do you have to do with the machine, what supervision or control do you have? A. With new machines, give them a commission of what the machine happens to bring in.

Q. You said the machine contains a label with regards to persons under the age of 18, I believe, is that right? A. Yes, that is what it says on there.

Q. Other than that label, do you supervise the playing of these machines? A. It's impossible.

Q. Well, then, would you say this, that whether a machine is played by a minor or whether it is not, whether it is used for gambling or whether it is not, is dependent upon the merchant? A. That is correct. Do you mind if I add to that?

Q. No. Go ahead. A. At the time we install these machines, we make it very plain no gambling and no minors.

Q. Has that arrangement ever been breached by any of the merchants? A. Any of the merchants that I do business with?

Q. Yes. A. Not to my knowledge.

The Court: We'd better have our intermission at this time.

(Brief recess had.)

Mr. McLeskey: Now, if you notice, there are two Police officers here, Mr. Lashley and Mr. Remmert. We had to get our witnesses out of the room, and I think they ought to be out of the room.

The Court: If you want them out; there has been no formal request, however.

Mr. McLeskey: No formal request, but we have been observing it, I think, all of us.

Maverell Mauromatis,

called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Examined by Mr. Sherwood:

Q. Will you state your name and address to the court? A. My name is Nick. Maverell Mauromatis.

Q. Where do you live, Mr. Mauromatis? A. 294 Mayfair boulevard.

Q. What is the nature of your business? A. Well, I am the manager and secretary of the company, manager of Pop's Grill, 916 North High, and the secretary and treasurer of the Angelas Company.

Q. What business are they in? A. We have two bars, Presto Grill and Pop's Grill. Presto Grill, at Fifth and High, and Pop's Grill, First and High.

Q. Now, in connection with the operation of your two businesses, have you had pinball games, Mr. Mauromatis? A. We have had pinball games.

Q. And for what length of time? A. Well, we started in operation about '48, 1948, the company itself, and we had pinball machines, let's see, in 1950 we purchased Pop's Grill, we have had pinball machines in both operations. We had shuffleboards, shuffle alleys, baseball games, and upon issuance of the ordinance we removed all machines from the establishment because of not wanting to cause any friction with the liquor department.

Q. In other words, in the operation of your businesses, you have bars in connection with them? A. Yes, we do. We serve liquor.

Q. And the passage of these ordinances, then, in 1953, caused you to ask the operator to have the machines removed? A. Not only did I ask him, I called him and re-

quested him to remove them without hesitation, because we didn't want to have any friction with any legal court procedures which would endanger our operations, because we depend on them for a living.

Q. During the years, then, in 1948, in other words, you have no pinball games in your places now? A. No, we don't have pinball games in our places now; we have shuffleboard and a bowling game, they call it, I don't know, Fascination, and a shuffleboard game, these balls returning into the older type of board we had in 1948 with the new conversion unit on the end, I don't know what they call it; then we have another bowling game; we have no pinballs in the operation now.

Q. How do these games operate, do they register scores? A. They do register scores.

Q. How do the players play them? A. Well, our play varies. We usually, we will have a lull period, but most of the time our play on the machine itself is after different shifts come home from work, we will say, they stop in more or less to have a drink, relax and go on home, maybe after an hour we will have play on the machine between 4:00 and 5:00, and then 5:00 to 6:00, and then it will die down from then until 9:30, and it will die down again till about midnight, where we will have some Timkens, and we will have some Jeffrey men come in, then 1:00 o'clock for the early shift of North American, and 2:00 o'clock the late shift of North American, which gives them time to take a drink and relax and go on home. Continuous play, we don't have that. We count on that, it's a drawing card; we don't have no dancing, no other type of amusement besides the juke box.

Q. So the games and the juke box are the only forms of entertainment that you have? A. That is the only form of entertainment that we have.

Q. During 1948 to 1953, when you had pinball games in your places of business, did you have any games that made any return or paid any reward to the player? A. At no time, no. We have never paid off on any type of machine, any scoring device. First of all, we don't approve of that on our own premises, we have never paid off, period.

Q. Did any of the machines themselves return any tokens or checks or merchandise? A. No, sir. It was purely for amusement. At no time they were paid off on any type of device we had in there, shuffleboard, shuffle alleys. As far as the revenue from the machine, I can say one thing, that on a new machine that we install, we can just about count on having our rental paid from the machine's operations themselves. At no time have we tried to promote the machine. When we see the play goes down, we try to replace it with a new device so we can receive income from it, but as I say, on a new machine it can be equivalent to our month's rental from the operation of the machine itself.

Q. Would you like to have pinball games in your place of business again? A. Yes. I would say with the—I mean, I can't say. If this ordinance does go through, it will throw an additional burden upon us, and, as a matter of fact, it will break our breaking even point of operation; in a smaller location, it will bring it down to a narrow margin where people operate in the red. As it is now, we have five people making an income from the operation itself.

Q. Then, your experience with the games as amusement devices causes you to find that they were profitable? A. They were profitable, definitely.

Q. Has your experience with the games given you an opportunity to observe whether or not they cause idling and loitering? A. I can't say that it causes idling and loitering; definitely in my operation they don't; they will cause a form of amusement, but if you say watching football is idling, then it will be hard to define. I mean, we have four or five people shooting on a shuffleboard, they all watch the score, if you call them idling, but they have never done that. If they do sit around long enough, we have the waitresses impose on them for a drink, if they don't want any we tell them to go.

Mr. Sherwood: Cross examination.

Cross Examination

By Mr. Leach:

Q. You stated, sir, making a lot of revenue off the machine, in fact, enough to pay your rental; if that were stopped, your operation might go into the red, is that correct? A. I will say one thing, we have seen in our operations that we are able—well, I would be committing myself stating specific figures, but they have paid quite a portion; as a matter of fact, we have paid our rental from the operation of the machine itself.

Q. You have been doing it for the last year or so, haven't you? A. You mean on the juke box itself?

Q. No, on the juke box, bowling alley, shuffleboards, whatever they are. A. I would say yes, and I have also lost a percentage—let's say a percentage of that loss would be equivalent to 20 to 25 per cent, to what it had been, it dropped about one-quarter.

(Last question and answer read.)

The Court: I don't understand the question. He gets free games, he doesn't pay for them, does he?

Mr. Leach: If the court please, in my question I did not infer that the patron paid the merchant for the free games, I inferred that the merchant, instead of permitting the patron to play out the 16 games, paid him for the 16 games, gave him money instead of the 16 games, and at that time cleared the machine.

The Court: In other words, you are inferring when the man wins free games the merchant will pay him instead of letting him play, is that right? That was the purport of your question, as I understand it now.

Mr. Leach: That is correct, sir.

Q. Let me ask you this, Lieutenant, if I were to play that machine and at the end of my play it registered 16 at the top, could I then go ahead and play 16 straight free games from the machine? A. You could, or you could, if there is a payoff being made, you go to the Manager and he will pay you a certain amount for the games you won, then he clears the machine and you take what you want to and start the machine over again with coins. It works both ways.

The Court: That is when they are using it for gambling?

The Witness: That is correct, sir.

The Court: All right.

Q. Are you familiar, Lieutenant, from your experience with regards to the device or the distinction between a free play machine and a non-free play machine? A. Well, a non-free play machine, they tell me, I am not an expert on those machines, they tell me there is an attachment that goes on.

Mr. McLeskey: Now, just a minute. What he tells is not competent. If the officer is not familiar, that is the end of it.

Mr. Leach: If the court please, we got into this from plaintiffs' witnesses to the same extent.

The Court: Well, men who knew.

Mr. McLeskey: Unless the officer says he is an expert or knows, himself.

Q. Have you ever seen the device which may be placed into a pinball machine to convert it to free play? A. I have seen them, yes.

Q. I realize, sir, that you are no expert in this field, but can you describe that device to the best of your ability, as you recollect it? A. The only thing I can tell you, it's a device, it's a tripping mechanism.

Q. How does it appear, what does it look like? A. The only thing I can tell you, as near as I can describe it, it's a device that goes back usually underneath the coin-operated machine, has two wires to it; it's a mechanism; how it works I don't know.

Q. Well, is it something like a little box? A. The ones I have seen were machines that have been destroyed. I have seen those parts, but I can't tell you just exactly how they work.

Q. Have pinball machines or pinball games been in locations in the city of Columbus during the majority of your time on the vice squad, since January of 1954? A. I would say it is in the minority rather than the majority. When I took over the squad in 1954, the injunction was already filed, and they were moving machines out at about the time that I took over the vice squad, and the machines

were out of the city of Columbus, except some that were in storage up until the time this last injunction was granted, then they were brought back into the city.

Q. Can you tell the court what your experience has been with regard to pinball machines since they were reinstalled in the city? A. Well, up until when they came back in the city, and up until a month or five weeks ago, I had received no complaints on the machines. When the machines at that time went back on free play, we commenced getting a lot of complaints on them.

Q. From whom were those complaints? A. From people all over the city of Columbus.

The Court: Well, now, officer, you said when they went back on free play; did I understand you to say that?

The Witness: That is correct, sir.

The Court: In other words, some of these machines do grant free plays?

The Witness: That is correct, sir. Some do and some do not. When they first moved them back in the city, I didn't know of a machine in the city that was on free play, up until four or five weeks ago, when they started putting the free play back on the machines, and that is when we commenced to get complaints.

Mr. Sherwood: I think I am going to object to that "they" unless we know who that "they" is.

The Court: Of course, that is a general statement. There isn't any dispute but what the granting of free plays makes it a gambling device.

Mr. McLeskey: It's a debatable question.

The Court: It has been held by courts—

Mr. McLeskey: Yes. Judge Clifford and Judge Bell, and I say, the Court of Appeals has reversed Judge Bell

that it is a gambling device. Even our local courts, to say nothing to the contrary. We excluded free play voluntarily from our definition; in other words, prohibited free play, that first injunction, sergeant, you should remember.

The Witness: That is right.

Mr. McLeskey: Prohibited free play from our injunction.

The Court: I understand so far none of these owners have machines that have free play?

Mr. McLeskey: That is it, that is the custom; there is nothing to the contrary.

Q. Have there been any arrests and convictions for operating pinball games as gambling devices?

Mr. McLeskey: I object to the question. The record would be the best evidence on that.

The Court: Well, he may answer that.

Mr. McLeskey: Note an exception.

The Witness: Since I have had the vice squad, we have made three arrests on pinball machines, and that has been in the last—I can tell you the exact date.

The Court: Well, now, were there convictions there, officer?

The Witness: We had three arrests, two convictions and one pending.

The Court: Is that because they were used for gambling purposes?

The Witness: That is correct, sir. There was an arrest made on 10-25 of this year.

Q. Now, Lieutenant, calling your attention—

The Court: Just before you go, there, Russell, pardon me for interrupting.

Mr. Leach: Yes, sir.

The Court: The gambling, did it consist of the possessor of the machine giving prizes for scores, or did it consist of a participant's gambling on the outcome?

The Witness: One of the machine used a payoff and the other achine the prize was free plays.

The Court: There is no question, then, is there?

The Witness: Any question in my mind, Your Honor?

The Court: I mean by that there was some reward?

The Witness: That is right, sir.

Mr. McLeskey: May I innterrupt? In other words, it was either a free play or a playoff for a free play?

The Witness: That is correct.

Mr. McLeskey: In other words, it is purely free play, is what it was?

The Witness: That is right.

Q. Now, Lieutenant, are you familiar with the parties named as plaintiffs in these actions? A. If you reveal their names, I can tell you.

Q. All right, sir. The names are G. D. Ferguson. A. I do not know G. D. Ferguson.

Q. Well, now, let me stop before I start. What I am about to ask you is whether or not those convictions that you mentioned involved machines owned by any of these parties, and I will read the parties: G. D. Ferguson, Ray Benjamin, Emil Windmiller, Paul A. Chapman, Guy Oddi, Jack D. Smith. A. We have one of Smith's machines, I understand.

Mr. McLeskey: Smith is in the first case, not the second.

Mr. Leach: That is correct.

Mr. McLeskey: Not the second.

Mr. Leach: Yes.

Q. You remember whether on not that was the free play or the payoff? A. Smith's machine is that one right there.

Q. That is Smith's? That's right.

Q. Morris Siegel, Lawrence Shankman, Michael Cherry, Kenneth P. Kelsey, Sarkis Anthony? A. One of the machines belonged to Anthony.

Q. And if you remember, what was the background of that situation? A. What do you mean by "background"?

Q. Well, I mean, was that a payoff or was that a free play and has there been a conviction? A. There has been a conviction on Anthony's machine.

Q. And was that a free play or a payoff? A. That machine was on free play.

Q. That machine was on free play? A. That is correct.

Mr. McLeskey: Let the record show we are objecting to all this testimony without the records.

The Court: Yes, I understand.

Mr. Leach: You want us to bring the records in?

Mr. McLeskey: I made my objection, made my record. The court has let it in.

The Court: It won't prejudice the court any.

Q. Now, have you as chief of the vice squad and as a member of the Police Department nad occasion to talk to merchants and operators and patrons and what-have-you with regards to pinball machines?

Mr. McLeskey: Well, now, was that in our presence or the presence of any of the plaintiffs?

The Court: I will sustain that.

Mr. Leach: All right.

Q. Lieutenant, could you give the court your opinion as to whether or not a pinball machine not rigged for free play and where there is no payoff upon a high score would be a good business deal; would there be money made on it?

Mr. McLeskey: I will object to the question.

The Court: Yes, I will sustain it. You are asking him for an opinion. We have had witnesses who testified from their experience.

Mr. Leach: If the court please, the same of these witnesses. I freely admit that some of the witnesses over my objection were permitted to answer that question when they, themselves, admitted that they put the machine in the store and after that exercised no supervision; I objected to that and it was overruled.

The Court: I know, but the men that had them in the stores, they are the ones that know if it is profitable or not.

Mr. Leach: Mr. Ferguson testified to that question, sir, and testified over my objection. I attempted to qualify Lieutenant Lashley, and that was objected to.

Mr. McLeskey: And you are getting at, if Your Honor please, Mr. Lashley will not claim to be an expert on that business. I object.

The Court: Well, there is no use going on speculation where you have men who have had them in their business and operated them and know what they do.

Q. Lieutenant Lashley, in your opinion, does a pinball device encourage gambling?

Mr. McLeskey: I object.

The Court: Let him answer.

Mr. McLeskey: Note an exception.

The Court: Now, you are limiting it to pinball machines that have no payoffs or no rewards and no free plays; are you limiting it to that?

Mr. Leach: I will limit it to that.

Mr. McLeskey: Well, let's limit it to that if you want to ask him.

The Witness: I can probably answer that in this manner, a pinball machine that is not used as a gambling device does not show too much play.

Mr. McLeskey: I move to strike that answer as not being responsive.

The Court: I am going to let it stay in.

The Witness: A good example of that is Union Station, when we had the license they had 19 machines used purely for the people coming and going to the Union Station, and those machines, you didn't see too many people around there playing them.

The Court: Then, your conclusion, Officer, would be that machines like that will not encourage gambling?

The Witness: I would say you don't notice too many people playing them.

Q. Have you had trouble or complaints or experience with regards to gambling on a straight machine between two patrons? A. Yes, we get those complaints.

Q. You get them? A. Yes.

Q. Do you, of your own knowledge, Lieutenant, know where the bulk of pinball machines are located? Could you describe to the court where most of these are?

Mr. McLeskey: I object to that question.

Q. What type of business establishments?

The Court: Let him answer.

Mr. McLeskey: Note an exception.

The Witness: Would you repeat the question?

Q. What type of establishment generally has this pinball machine? A. Pool rooms, confectioneries, drug stores, restaurants, practically all places of business. There is quite a few of them in different homes in the city, and those are the places the biggest majority of your machines are located.

Q. You mean the total receipts that you made from all games? A. Yes.

Q. You would say 25 per cent of that was strictly pinball? A. I had two machines at the time, and one of them, I would say, at least one-quarter of it was derived from the pinball machine, and I would say an equivalent amount out of the other operation at the two places. At no time, I want this to be definite, have we ever paid off on a machine.

Q. From whom do you get your machines? A. Morris Siegel and Mr. Shaffner. As a matter of fact, I have had Mr. Warner in there, and I have had—let's see, my juke box is Riebolt at the present time, my cigaret machine was operated by Hooffstetter, and Mr. Warner took over.

Q. Have you at any time with any of those operators or their agents had any conversations with regard to payoff or free plays? A. Never. As a matter of fact, I demanded that there be no payoff for a new machine coming in, it had to be on the basis of no free play on the machine.

Q. Did anyone indicate to you that you could get a machine that did give free plays? A. Mr. Warner did, at one time. As a matter of fact, upon that basis we eliminated him altogether.

Q. You testified, I believe, that on occasions various patrons stand around and watch other people play? A. I will say one thing, they are not allowed to stand around; we tell them to sit.

Q. You mean only one person can stand if the machine is being operated? A. If there is four people playing the machine, maybe the people playing the machine will stand, all the others are to be seated around the machine; as a

matter of fact, we demand they be seated, otherwise they can't be served at all.

Q. Have you ever seen any patrons attempt to gamble on the machine in your presence? A. To say it would be just like trying to tell me that nobody would gamble. If they do, we try to stop it immediately in the first stages of the game; we frown upon it; we stop it. As a matter of fact, the employee that allowed anything like that to go on is fired.

Q. Would you say that there is someone close to the machine supervising it at all times? A. I would say the bartender is watching it, because it is within his sight at all times.

Q. I would like to ask you this, I realize that whenever that starts you immediately attempt to stop it, but I would like to ask you within your experience how often that someone attempts to before you stop it? A. I couldn't tell you. As a matter of fact, we have a machine in there that they don't gamble on it.

Q. What type of machine is it? A. It's a Fascination pool game; four people play it. One side tries to get the ball in the pocket while the other side tries to prevent it from going into the pocket. When they installed the machine, I asked them, "Is that a pinball machine?" They said, "Definitely not." I said, "If it is, I don't want it in," and Morris Siegel, he was the operator at the time, you can ask him, I told him, "If it is, I don't want it in to jeopardize my business."

Q. Now, I am referring specifically to pinball machines. Of course, you haven't got them now; when they were there, did you, or how often did you have to break up an attempted gambling going on? A. Well, now, I can't state

a regularity. Let's see. Oh, it might have been once since about—well, I can't state specifically, but I can say that I have to say that I haven't would be lying; I have stopped them, as a matter of fact, as soon as I heard or even from the conversation, I immediately walked up and stopped them and told them, "If you guys don't want to play, you will have to leave." That is the specific policy we have set up, and they know it. As a matter of fact, you come in and talk to any of the customers, but to say that they didn't, they do.

Q. Would you say this, that the percentage of people that would gamble on a pinball machine would be higher than the percentage that would gamble on that little pool table that you have described? A. Well, that would be just like telling me do the same people play them, yes, the same people do play both machines; whether they gamble more on one than the other, I don't know. I mean, I am not saying, because I can't give an answer on that, because, first of all, when they see me walk in, there is no gambling done, or the bartender walks in; if we follow them to the places where they do gamble, then, I could give you an answer, but on this I can't give you an answer.

Mr. Leach: That is all.

By Mr. Sherwood:

Q. I did want to bring out one point. This pool game you are talking about, is that a table game? A. Yes, it's a table game.

Mr. Sherwood: Thank you very much for coming down.

Mr. McLeskey: That's all.

The Court: Who's next?

Mr. McLeskey: Just a moment. Mr. Leach, will you admit the genuineness of the signatures on the contract, specifically the service director? I can prove it if I have to.

Mr. Leach: I will admit that.

Mr. McLeskey: All right. Let's mark this Plaintiffs' Exhibit B.

And thereupon, as above indicated, the document above referred to, being a contract, was marked Plaintiffs' Exhibit B for identification.

Mr. McLeskey: If the court please, we have here what purports to be and is admitted to be a contract between the City of Columbus and Guy Oddi, who is one of the plaintiffs in this case, for the operation of a coin-operated bowling machine at the Airport. That contract became effective on the thirtieth day of August, 1950, and was to go to the thirtieth day of August, 1955.

We offer in evidence that contract. The contract provides that the division between the city and Oddi was to be 50-50.

The Court: All right.

Mr. Leach: If the court please, I would like to object to the admission of that exhibit primarily because of the fact that it indicates a contract with regards to a bowling alley, a coin-operated bowling alley, not a pinball machine.

Mr. McLeskey: It's the same principle.

Mr. Leach: Is it, or isn't it?

Mr. McLeskey: Oh, yes.

Mr. Leach: I say it is not. There has been no evidence to show it is.

Mr. McLeskey: We put all the games in; we showed the principle was exactly the same. Mr. Solomon, I believe,

made the distinction there might be a little more skill in the pinball than shuffle, but the other witnesses said it was exactly the same.

Mr. Leach: If the court please, the only device in question in these cases are pinball devices. This contract relates to a bowling machine, coin-operated bowling machine. I am objecting to the admission for that reason, and for the second reason I am objecting is the fact that that contract, I believe—

Mr. McLeskey: It goes to '55.

Mr. Leach: Was executed prior to the enactment of the ordinances in question.

Mr. McLeskey: But it is still in operation. So far as the record shows, it is still going to 1955, unless it is shown to the contrary.

The Court: Who is the other party, the City of Columbus?

Mr. McLeskey: The City of Columbus and Guy Oddi. It provides for the operation of coin-operated bowling machine; that is one of the machines we have been talking about here, it has a score.

The Court: It may be admitted.

Mr. McLeskey: Division of 50-50 between the city and Mr. Oddi.

The Court: All right.

Mr. McLeskey: Plaintiff rests.

And thereupon the plaintiff rested.

The Court: Ready for the defense.

Be it remembered, that the defendant, the City of Columbus, to maintain the issues on its part to be maintained, offered and introduced in testimony on its behalf, the following evidence, to-wit:

Alfred J. Lashley,

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Examined by Mr. Leach:

Q. State your name, please. A. Alfred J. Lashley.

Q. And your official position, if any? A. I am a lieutenant, Columbus police department, present time in charge of the vice squad.

Q. How long have you been in the police department of the city of Columbus, sir? A. Since the first day of December, 1935.

Q. And how long have you been assigned to vice squad duties? A. Well, the first two years I was in the police department, I worked the vice squad, and I took over the vice squad the last time the second week in January, 1954.

Q. Can you describe to the court the general duties of the vice squad, just very briefly? A. The vice squad handles all complaints on prostitution, liquor law violations, gambling, narcotics and morals violations.

Q. Have you, through your association with that squad and with the division of police, had occasion to deal with pinball games within the city of Columbus? A. I have.

Q. And has that occurred since January of 1954, when you became chief of the vice squad? A. Yes.

Q. Now, Lieutenant, I would like to call your attention to the pinball machine which has been brought into the court room and which at this time I would like to ask be marked as Defendant's Exhibit 2, that, of course, is the machine on your right.

Mr. McLeskey: So I will not interrupt, just a moment.

Mr. Leach: Yes.

Mr. McLeskey: May the record show Plaintiffs' Exhibit A was offered?

The Court: Yes.

Mr. McLeskey: As a part of the plaintiffs' case, A and B.

The Court: Yes.

Mr. McLeskey: Excuse me.

Mr. Leach: It's all right.

Q. Have you seen that machine before, sir? A. I haven't saw the machine before this morning. I am familiar with the machine.

Q. Was that machine brought in from an establishment in the city of Columbus? A. It was, sir.

Q. And would you generally describe that machine for the court? A. Well, it's a pinball machine, and the machine is set up for free play. It registers a score, and to get your free plays you light up certain lights on your main diagram on the machine.

Q. Would that be similar to what is referred to as a Bingo type of machine? A. It could be similar to a Bingo type of machine.

Q. You said that that machine has a device whereby free plays are recorded and obtainable. Now, will you tell the court in your own words what you mean by that? A. Well, when you win on the machine, it records the winning, and the winning is recorded in free games. Those games can either be replayed without putting a coin in, or they can be paid for, and the person in the business establishment can click the switch and take the game in and make it operative.

Q. Where is that in that machine? A. In that machine it is the upper left-hand corner.

Q. Is that the register that at the present time registers 16? A. 16 free games, it shows on that machine at the present time.

Q. Now, that 16 was obtained by a player making a certain score, is that correct? A. A certain score or any certain combination of lights that he has gotten lit.

Q. Now, on the top of that machine, as it is presently set up, is a switch. What part, if any, does that switch play in this free play operation? A. This switch is usually, in most of the places we run into them, is usually over back of the counter in the establishment, and close to the cash register; this one was over back of the counter and close to the cash register that it came out of. When they are used as a gambling device, when they make the payoff, they call the owners of the establishment's attention to their score, then they make a payoff, then they are paying off for a certain number of games, then this switch, they pull the switch, and that runs the free games off, and the only way you can operate that machine is put a coin back in.

Q. Does that switch turn off the free play mechanism? A. In this case, all it does is trip the game so that you have to put coins back in to operate the machine.

Q. Assume that a person ran up a score of 16, free games, went over to the mechant, who paid him for the 16 games, the merchant then flipped that switch, that would clear the machine of the free games? A. Yes.

Q. Would the machine at that time again record free plays if you were able to get them? A. Yes.

Q. Assume that a person ran up a score of 16 free games and goes over and pays for the games. He doesn't pay for it after he get the free games?

Will you read what he said there?

Mr. Leach: I do. I am sorry.

The Witness: Yes. I arrived at a figure, as there are several figures on that, of what I call a skill percentage.

Q. Would you explain that term? A. May I refer to my report?

Q. You may. A. I have here a record of what I did. Here are some of the figures, some of which I just quoted, where a series of a hundred shots were made, and I made a mark which was due to a mark which was already on the machine they had arranged so that the player could pull back one place or another or another with a plunger and thereby get different power on his stroke.

I played back to what the maker, Bally, called No. 5, and presumably then if one ball had gone through the hole all 100 would have gone through the same one if the thing depended upon skill, and that was when I got 12 balls through one of the holes, in this particular run, 12 balls went through Hole No. 7, I record here, and then I made a plot of where the other balls went and showed a dispersion pattern of how they scattered out over the board, and they looked very much like a random pattern for any random sort of play that can be found in publications on chance; then I tried the same thing again, and this time, of the 100 balls, as I recall that, it doesn't seem to be in this paragraph, that I got something like six through one hole, that was a different hole, then changed the strength of the plunger, that is, pulled it a different strength of spring and made another series, and in that case the maximum number of balls in one hole is the same, that is, 12 balls, but they went through Hole 6 instead of Hole 7, so that gave two dispersion patterns which were very similar, and I have the dispersion patterns drawn, but the dispersion

pattern centered on two different holes, so that my skill did not accomplish the same thing in both runs.

Q. In each of those runs, was the plunger pulled back to the same mark? A. In one run it was pulled back to 5 and another mark 4½; they weren't the same run.

Q. Did you, in this examination, make any random tests? A. Yes, I did. After I had arrived at a figure that I called a skill efficiency, that is, by this mechanical means, by this mechanical means how good was I in getting balls through any one hole, compared to what I could do with random shooting, and to get the random shot I just shut my eyes and pulled the handle different distances back and lifted the handle, I pulled it over to one side so it would bind in the guide and all distances I could pull on it, I did for a hundred shots and kept a record again of the balls, and I found that the difference between the mechanical release, supposedly accurate, and my random shot, in one series was 2 per cent, that is the precise shot gave me 2 per cent in efficiency, and the next hundred series of balls it gained me exactly zero per cent in efficiency; I gained nothing or lost nothing, and then to my surprise I showed up to be better with my random shot than with my mechanical release of minus 1 per cent.

Q. Are you saying, sir, that in the test it showed the most indication of skill referring only to the top series of holes, that your percentage of bettering your score by a fixed release was only five per cent? A. A percentage of bettering was 2 per cent.

Q. 2 per cent? A. 2 per cent. That was the best figure of improvement, improvement on the series of a hundred.

Q. Now, then, sir, did you make any tests with regards to the second series of holes? A. Yes, I did make tests for

the second series of holes, but I could not get any results whatsoever on those, because in order to get into that second row of holes on down the board from the first, it is necessary for the ball to hit something and bounce, and I found that even though I could put the ball at a specific spot up on the board and start it from rest, assuming that some purely skilled operator could put that ball right there and start it from rest, I released it and I found that after the second bounce all skill was gone, even though I cheated that much by starting the ball from rest; that is, so far as getting the ball into the second set of holes was concerned, all skill was gone even then.

Q. Did you make any tests with regards to any more of the series of holes? A. No, I didn't go on down the line, because if all skill was gone there, I felt the others were certainly gone.

Q. Now, then, sir, you have testified according to the experiments that you have conducted of the skill factor, that it is just 2 per cent, can you explain to the court the factors in that machine that might tend to discount skill? A. Yes. Assuming that the operator is highly intelligent and watches what he does, he will draw the plunger to the same point every time or know where he should draw it, and he will rotate so the eccentric end is in exactly the same position or the right position, how it ought to be, before he releases it; once he has released it, that ball rolls down the trough in the machine I played it rubbed alongside to give it a left-hand turn around the playing field, and that was rather rough.

Q. Excuse me, sir, but I would like to go through this a little slower, and I wonder if you would stand by the machine and point out various things as you mention them.

In your testimony, back just a moment, you mentioned an eccentric plunger, I believe? A. Yes, the plunger tip, that is, if you inspect one of these plunger tips closely, you rotate it with the fingers and watch the tip, you will see a little button on the end which is not concentric with the shaft. If that button is off to the left, that will give the ball—the ball would travel a little piece to the left, and if you placed the button in the other direction, it's just like throwing a bowling ball.

Q. You have examined the two machines in the court, the Defense Exhibit—

Mr. McLeskey: That is Exhibit A.

Q. Plaintiffs' Exhibit A and Defense Exhibit 2, did you examine those machines with regard to the flippers in the aspect that you just discussed? A. Yes. I looked them over here before court.

Q. And what is their condition? A. Well, they seem to be substantially the same construction; that is, they are both a little bit eccentric.

Q. Now, you mentioned after you strike the ball with the plunger, it comes up the alley. Now, that is the place on the left of both of these machines? A. On the right.

Q. On your right? A. That's right.

Q. Now, would you go ahead with your testimony; I believe you mentioned rubbing at one place? A. Yes. The ball strikes the upper aspect of the playing field and is deflected after it passes under a leaf spring, which, incidentally, keeps it from coming back in the trough where it was fired from, in case it rebounds back, and the amount of rebound, of course, depends upon the distance to which the plunger was pulled, and I was able to get what looked like duplicate rebounds; that is, after the rebound there

were two duplicate rebounds, they looked duplicate, but there was never any certainty that the ball would go the same place it went before; that is, after that, the uncertainty began to show up, and the errors in the path of the ball, that is what gave this dispersion pattern.

Q. Now, then, sir, are there any other factors upon the machine identified as Defense Exhibit 2 which would cause to tend to discount the skill factor? A. Yes, there is. I made a rather extensive mathematical analysis on the effects of error of a round ball striking a round post, such as these are, with rubber bumper rings on them, and the amplification, remembering offhand the amplification of error by the time a ball had rebounded twice, had risen to something like 1,250 to 1, that is one degree of error in placing the ball in rebound against the post would make 1200 degrees difference in the end after it bounced twice; that is, the maximum you could make.

Q. Did you examine the surface of the playing field on the machine that you had? A. Yes, I examined it for roughness. I wondered if that had anything to do with it or whether or not the playing field was warped in any way, and could not detect that there was any warpage or anything that caused the balls to be erratic. In fact, I released balls, as I said before, from a number of special spots up at the top, just carefully released them and let them roll and see if they would follow a definite pattern, and they would not, even with the, just what little roughness there is on the board, it got deflected enough that the path was erratic time after time. I presume, if the boards were glass and the ball perfect, that would not happen, but on these boards it is erratic.

Q. Are those boards substantially like the board that you used? A. Exhibit 2 is, yes. As far as I can see, it is exactly the same.

Q. All right. Professor, you also mentioned in examination of the machine that you had with regard to the free play aspects; are you familiar with the device that converts a pinball machine from free play to non-free play, or vice versa? A. No. I wouldn't say I would know just what wires to take off to make the conversion, because I was forbidden to make any changes or any alterations, of course, on the machine I had in my possession, s I did not try that.

Q. And then your examination was with relation to the playing and how many free games you could get, or something like that? A. Yes, that is right.

Q. Well, as a result of your examination, did you reach an opinion as to whether the general playing of that game was predominantly skilled or predominantly chance? A. Yes.

Mr. McLeskey: Object to the question.

The Court: Overruled.

Mr. McLeskey: Note an exception.

Q. What was that opinion, sir? A. My opinion was that it was completely chance.

Mr. McLeskey: Move to strike the answer.

The Court: It may stay in.

Mr. McLeskey: Exception.

Q. That is, assuming there is a bit of skill at the top, it is discounted as you get to the lower rows of holes, is that correct? A. That is discounting completely any skill—if any man is able to muster up on the plunger, it is still completely a game of chance as to what the score is.

Mr. Leach: I have no further questions.

Mr. McLeskey: At this time, for the record, if Your Honor please, I am going to move to strike all the testimony of this so-called expert.

The Court: Oh, no. I wil let it stay in.

Mr. McLeskey: Note an exception.

Cross Examination

By Mr. McLeskey:

Q. You say you got the machine that you examined from the state liquor department? A. Yes, sir.

Q. You say that it was not, of course, Defendant's Exhibit 2? A. That is correct.

Q. You don't know whether that machine was in good working order or not, do you? A. Yes, I do.

Q. All right. Have you had a lot of experience with the manufacture of these slot machines, pinball machines? A. Only that one that was in good working order.

Q. I didn't ask you that. Did you manufacture that machine? A. No. I know it was in good working order.

Q. It was turned over to you? A. Yes.

Q. Who by? A. Oh, I believe a man by the name of McMahon called a trucking crew to bring it to me.

Q. Where did they get the machine, do you know? A. I don't know.

Q. Was it one they had seized somewhere? A. I think it was, yes.

Q. As I understand you, was that your first experience with a pinball machine? A. Yes, sir.

Q. And you are going to tell this court from that one experience you claim to an expert on pinball machines? A. I claim to be an expert in my testimony, yes, sir.

Q. We have introduced here, Professor, a man who has been making and selling these machines for 25 years and men who have been operating these machines for 25 years. Are you going to say that, compared to men of that type, that you are an expert on these machines? A. Yes, sir.

Q. You don't claim to have ever had the opportunity to really test Plaintiffs' Exhibit A, have you? That is the one to your right. A. Correct.

Q. The only thing you say is you have the machine which the Liquor Department turned over to you that looks similar to Defendant's Exhibit 2? A. That is right.

Q. Professor, you testified for the Board of Liquor Control in a case here about what, two years ago? A. About two years ago, I think it was.

Q. Would you recognize the name of the case if I read it to you? A. I think I would.

Q. Stickley and Peotter, doing business as Sticks Place, that was in Ohio, against the Board of Liquor Control? A. That's right.

Q. And the case was tried to Judge Bartlett? A. I cannot say what judge that was.

Q. That case was the case you testified in? A. Yes.

Q. It was in this court here, I mean, in this court house, it was in this court here? A. No, sir, it was not.

Q. You mean the case wasn't tried here. A. The case I testified in wasn't tried here.

Q. Didn't you testify in a case that was tried here? A. No, sir.

Q. You didn't? A. No, sir.

Mr. Leach: If the court please, I would like to object to this line of questioning, because I fail to see any relevancy.

Mr. McLeskey: Well, you will find out.

Q. I am going to hand you, I am not marking it for the moment, a decision in the case of Stickley and Peotter, doing business as Sticks Place, against the Board of Liquor Control, in the Court of Common Pleas, Franklin county, Ohio. Is that the case you testified in? A. No, sir, that is the company, but not the case.

Q. Where was the case you testified in tried? A. That was tried in the office of one of the officers of the Department of Liquor Control, on Third street. Isn't it?

Q. Oh, it wasn't tried in any court? A. It was not a court; it was a hearing.

Q. You went over there to—what was it, the board? A. Board hearing, yes, sir.

Q. Board Hearing, that is where your testimony took place? A. That's right.

Q. Then, that case was appealed, do you know, from the board to this court? A. I had heard in a roundabout way it was, yes, sir.

Q. I want to read you a paragraph from the opinion of the judge who heard that case on appeal—

Mr. Leach: If the court please—

The Court: Yes.

Mr. Leach: I realize—

Mr. McLeskey: I will call it to the court's attention.

The Court: You'd better do that.

Mr. McLeskey: "The testimony of the engineer-professor as an alleged expert offered little interest or value, if any, and does not indicate that he was as much of an expert as even the agent who no doubt knew more about such machine. This court is of the opinion that the testimony of engineer-professor did not qualify him as an expert."

Q. You agree with that opinion? A. The judge said that?

Q. Yes, he said that about your testimony. A. I do not agree with the judge, I am sorry.

Q. All right. You aren't a mechanical engineer, are you? A. Yes, sir.

Q. You mean a graduate mechanical engineer? A. I am a registered state of Ohio engineer.

Q. I understood you to say you graduated as an electrical engineer. A. That's right.

Q. Did you also graduate as a mechanical engineer? A. No, sir, I did not.

Q. Then the only experience you ever had with these machines was this one so-called experiment that you made, is that it? A. That's right.

Q. You claim no practical experience in the operation of the machine, or the sale of it, or dispensation? A. Nothing in the sale and dispensation, but in operation, I did a lot of that.

Q. Do you claim to be an expert in the operation of machines of this kind? A. That is, I learned to be an expert, yes, sir, like in the case—

Q. Have you ever operated one of these machines before? A. I never had.

Q. Never had? A. Never had.

Q. Have you operated any since? A. Not until I pulled the plunger on this one here today.

Q. You hadn't seen one since you made that experimentation, is that right? A. Yes, I had seen them.

Q. But no operation? A. No operation.

Q. Do you ever play billiards? A. Yes, sir.

Q. After the ball leaves the cue, does the player have any control over the ball? A. No, sir.

The Court: I suppose there are very few places that have more than they have at the Union Station?

Q. Lieutenant, have you ever witnessed the conversion of a pinball machine from free play to non-free play, or vice versa? A. Personally, I have not.

Q. You have not? A. No, sir.

Mr. Leach: Thank you. That is all.

Mr. McLeskey: No cross examination, if Your Honor please.

The Court: We will suspend to 1:30.

(Recess had to 1:30 of the same day, Wednesday, November 16, 1955.)

Afternoon Session, Wednesday, November 16, 1955.

The Court: All right.

Emerson Edward Kimberley,

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Examined by Mr. Leach:

Q. State your name, please. A. Emerson Edward Kimberley.

Q. And your address? A. 2638 York, Upper Arlington.

Q. And your occupation or profession, sir? A. I am an engineer.

Q. When were you admitted to the practice of engineering in this state? A. I believe it was 1934 or 1936.

Q. And did you receive your education from Ohio State? A. Yes, Ohio State University.

Q. Are you a licensed engineer, sir? A. Yes, state of Ohio.

Q. Would you briefly describe your experience since graduation from the university? A. Well, I graduated from Ohio State University in 1921 with a degree of Bache-

lor of Electrical Engineering, and went to General Electric Company in Fort Wayne, Indana, went through their student training course, and became an advisor of machines, stayed there about a year and a month or two, and then went to the Westinghouse Electric Corporation, sales engineer, out of the Columbus office here, for about two years and a half, went to Ohio State University 1924 and been there ever since, coming up through the rank of instructor, to full professor 14 years ago.

Q. Prior to the opening of court this afternoon, I believe you examined the two machines that have been marked in this case as Plaintiffs' Exhibit A, which is the machine on your left, and Defense Exhibit 2, which is the machine on your right. Calling your attention to the machine on your right, which has been marked as Defense Exhibit 2, I will ask you whether or not you ever had occasion to deal with a machine of that general nature? A. Yes, I have.

Q. Would you tell the court when that was and very briefly how that came about? A. Well, that was about two years ago, the state of Ohio and Department of Liquor Control asked me to investigate what kind of devices these were with respect to skill and chance, and they loaned me a machine similar to Exhibit 2, and I played it and experimented with it and tested it for several months to get thoroughly familiar with it, and to decide on what I thought about the skill and chance.

Q. Now, could you tell the court the distinction between the machine that you tested and the machine that is in the court room? A. The distinction lies, I believe, entirely outside the playing field. Now, the playing field is the horizontal board with the holes in it; that seems to be exactly the same as the machine I worked with, the back-

ground, whatever you call it, and I believe the Bally Manufacturing Company calls it the background with all the scoring devices shown on it is different, they seem to build several types there, and the front controls that the operator can manipulate are somewhat different, too.

Q. I believe you indicated that the playing field is substantially the same. Is the device whereby the ball is propelled, which I believe is called the plunger, is that substantially the same? A. It looks exactly the same, yes.

Q. Is this machine, Plaintiffs' Exhibit A, manufactured by the same manufacturer which made the machine on which you did work? A. Yes, that is the Bally Manufacturing Company, yes.

Mr. McLeskey: You are referring to Exhibit A?

Mr. Leach: No. I mean two.

Mr. McLeskey: You had Exhibit A in your question.

The Witness: Yes. I corrected it to Exhibit 2, I thought that is what he meant.

Q. Now, can you tell the court the manner in which you examined that particular machine? A. I examined it with respect to two distinct features on it, the first was, I wanted to know whether or not I believed anybody could develop a skill on the machine to place a ball in any particular hole.

Mr. McLeskey: Now, which machine are you talking about? He is talking about two, now.

The Witness: Yes, two.

Mr. McLeskey: All right. Go ahead.

The Witness. I examined it with respect to that, and I also examined it with respect to free games, which it offered a player.

Q. Now, sir, in leaving out the free game aspect for a moment, how did you make your examination with regards to the element of skill? A. Well, I tried to develop skill on my part in the first place by doing the best I could to duplicate shots and was unsuccessful in that, but I thought maybe I was just an unskilled sort of a fellow, and I'd better put a little bit of mechanical skill in it, so I built a mechanical release, which I attached to the plunger so I could pull the plunger in rotation exactly the same every time, because the end of that plunger has an eccentric tip on it which makes the ball erratic otherwise, so I duplicated the shots by a mechanical tripping device which on this I prescribed off every shot, and I used the same ball so it would be the same, and I made a number of runs, I called them, and a run consisted of 100 balls; I shot the one ball 100 times and presumably, if there were any skill involved in this thing, if I duplicated mechanically the action I put on that ball, then supposedly that ball would go in the same hole every time, and I ran several series of those for checks and cross-checks, and I wasn't able to accomplish much in the way of putting the ball in any particular pocket.

I found that I did come out with a figure which, as my report—has it been in evidence?

Q. No, sir. A. I did find a figure which showed that a ball might have some preference for where it went in the first row of holes, but in order to accomplish what I thought was the purpose of the game, that is, to show how well you could do to place the ball in the holes, it is necessary, too, in order to get any indication on the backboard, you must put the balls in the holes, which light up in some particular sequence of cards, playing cards.

Q. Could I interrupt you just a moment, sir? I believe the court can see that machine; we are all familiar with it. Can you tell us what, in your opinion, is the object of that game or what are you supposed to do? A. Well, the object of the game is to put the balls out of a set of five, which the machine I have played gave me for a nickel, the object was to put those balls in holes which had random numbering on them—incidentally, such as that, when the number with the ball dropping through it registered on the card that the player looked at on the backboard, it would light up lights in a string, three horizontally, three vertically, or four vertically, something like that, and when he accomplished that, why, then there was an indication on the top of the board that showed he had shown presumably some skill, and that was the object of the game, and that is what I tried to do.

Q. It would be similar to a Bingo game, I mean as far as the backboard is concerned? A. Yes. They are called Bingo-type pinball machines, they tell me.

Mr. McLeskey: Not what they tell you.

Q. In making these experiments and tests, approximately how many balls did you shoot? A. Well, I suspect that I shot between three and four thousand balls.

Q. Now, I interrupted you a moment ago. Could you go ahead and tell the court what you attempted to do in these experiments and what result you obtained? A. Well, I attempted to show first that duplication of shots would give duplication of results. I feel that if a skill is involved that is a necessity, you must get the ball in the same hole if you do exactly the same thing with the plunger, and that is what I tried to show, that that could be done by

exact mechanical means, and then if I could show it could be done by mechanical means, then I thought it was fair to presume some man would be that good and duplicate the mechanical means, and I did my best to discover some chance for skill, and that was the whole purpose of the mechanical arrangement.

Q. Now, then, did you attempt to place balls in one of the selected holes at the top row through that mechanical trigger device? A. No, I did not, because I found that even with the mechanical trigger I couldn't muster enough skill to put the ball in any particular hole, so what I did, I adjusted the trigger arrangement on this firing so a series of 100 balls and I then looked and kept a register of the score, and then I said, "Well, for example, here's the highest number of balls that went into any one hole was seven;" I remember on one of those runs, I just happened to look over my paper this morning after I talked to you, and found it was seven. Well, that meant then if I had any skill or I must have been aiming at Hole No. 7, because that was the most success I had, seven balls out of a hundred, and then when I would duplicate that, why, I wouldn't get seven balls in the same hole, I would get, say, six or some other number in the same hole, and it wouldn't be the same hole, it would be an entirely different hole, and as far as I can see, there was no change whatsoever in the play.

Q. Let me ask you this, sir, if you were to assume a machine such as Plaintiffs' Exhibit 2 with only the holes at the top, from the examinations that you made, could you figure out the percentage of skill plus the percentage of chance involved?

Mr. McLeskey: Of course, you mean Defendant's Exhibit 2?

My question is, is there any difference in these machines?

The Court: What is the difference?

Mr. Leach: That is the only difference I can see in Plaintiffs' Exhibit A there is one hole and over in defendant's exhibit there is whole raft of holes.

The Court: Well, go ahead.

Mr. Leach: This machine that was brought in is a true representation of that type of machine?

The Court: It has no payoff.

Mr. Leach: That's right. That machine is similar, leaving out this board, while he is talking about this machine in that case and this machine in this case.

Mr. McLeskey: We are talking about the only one that is in evidence, Plaintiffs' Exhibit A.

The Court: The only kind that we are considering is the machine that has no payoff.

Mr. Leach: Well, I realize that. What I mean is, would any order of this court be confined to this playing field?

Mr. McLeskey: Yes. That is the only one in evidence; that is the one the court has to go on.

Mr. Leach: That is all I have for you. Do you have any more questions of Professor Kimberley?

Mr. McLeskey: I don't think so. I again ask the court to strike the Professor's testimony from the record.

The Court: It won't be prejudicial.

Mr. McLeskey: All right. Note an exception.

I did want to call the Court's attention to one of the opinion of a judge of this court.

The Court: Well, that is a matter for briefs.

Mr. Leach: You have no more questions of the professor, have you, sir?

Mr. McLeskey: No.

Arthur E. Remmert,

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Examined by Mr. Leach:

Q. Would you state your name, please? A. Arthur E. Remmert.

Q. And your official position, if any? A. Lieutenant in the police department.

Q. That is of the city of Columbus? A. City of Columbus.

Q. How long have you been so employed, sir? A. 22 years and six months.

Q. And have you, as a result of that experience, had contact with such devices as pinball games? A. Yes, I have.

Q. Could you tell the court briefly what experience you have had, and by that I mean, what assignments and that sort of thing? A. Well, I served five years on the vice squad as head of the vice squad, and during that period made numerous arrests on pinballs.

Mr. Sherwood: Object. We are not discussing something in the past.

Mr. McLeskey: And not arrests, either.

The Court: No. What is the next question?

Q. What is the function of the vice squad, sir? A. Suppression of gambling, vice of all descriptions, prostitution, illegal sale of whiskey, beer.

Q. Did you have occasion during that time to make or have official knowledge of any arrests for gambling upon pinball machines which resulted in convictions?

Mr. Sherwood: Object.

The Court: I am going to let him answer.

Mr. Sherwood: I would like to have the time, place, Your Honor.

The Court: Yes.

Mr. McLeskey: Note an exception.

Q. You go ahead. A. In the year 1952, I made 21 arrests and convictions for pinball, in 1953 I made nine.

Mr. McLeskey: I move the '52 go out, Your Honor.

The Court: Well, it won't prejudice the court. They were operating those as gambling devices, were they not?

The Witness: As gambling devices, yes, sir.

Q. Now, can you tell the court, not with regards to a specific case, but the various ways that a pinball machine can be used for gambling?

Mr. Sherwood: Well, now, I object to that. We are not interested in what can be, we are interested in what is done.

The Court: Yes.

Mr. McLeskey: I object.

The Court: Just how they were used for gambling, he can tell that.

The Witness: By registering a score which shows a certain number of games that they have won by the insertion of a coin in the slot by free or replay on the machine, which can be controlled remotely or directly at the machine.

The Court: Well, now, what do you mean by "remotely"?

The Witness: A wire is inserted in the operation of the machine by a skilled mechanic, which automatically takes off the number of games that a man has won by his element of chance in playing the ball in the machine.

The Court: Well, that again is where machines are set up for free plays.

The Witness: That is right, sir.

The Court: If the machine does not have a free play arrangement on it, that does not apply.

The Witness: Not necessarily, if it registers a score or a number of games that the man has won.

The Court: But there has to be a free play provision in it if he wins any?

The Witness: As long as it shows the number of games that he has won and he can call the attention of the operator of the place to that number and that man will walk over and pay him, then either by remote control or by direct application of a button that is secreted in the machine, he can knock that off, and the man don't get the free play.

The Court: That still has to be in the machine?

The Witness: That is right, sir.

Q. Lieutenant, there has been introduced into evidence a pinball game which at the moment, I believe, is not fixed for free play, there is no free play register on the backboard of the machine. Can that machine be used for gambling?

Mr. McLeskey: Now, of course, I object to that; "gambling" is a broad term. What do you mean? There might be some question as to—

Mr. Leach: Let's put it this way. I will withdraw the question.

Q. Lieutenant, from your experience, were all of your gambling problems with pinballs confined to machines rigged for free play? A. No.

Q. And will you explain why you said "no"? A. They register a score and it may not have any free play whatsoever connected with it, and when you attain a certain proficiency in that score, you can get paid off.

Q. By whom? A. By the proprietor.

The Court: Well, that has to be something apart from the machine; that has to be an arrangement between the proprietor and the player, does it not?

The Witness: That is right, sir, that is right.

The Court: If there is no arrangement, then they don't use it for gambling?

The Witness: They don't use it for gambling.

Q. Have you had occasion, Lieutenant, through your experience, to know of machines operated either through free play or by payoff or something like that, and then also to know of machines where there were no payoffs? A. Yes, I have.

Q. And through that experience, have you arrived at an opinion as to the play of those two machines?

Mr. McLeskey: Oh, I object to that question.

The Court: Oh, let him answer.

The Witness: Where there is no payoff, there is no—very little congregation around the machine, but where there is a payoff you usually have a crowd.

Mr. McLeskey: I move to strike that answer.

The Court: Oh, let it stay in.

Mr. McLeskey: Note an exception.

Q. Have you had any trouble as head of the vice squad, or did you have any trouble with regards to pinball games in anything else other than gambling?

Mr. Sherwood: What do you mean by that? I object to that because I don't understand it.

The Court: Yes. I don't, either.

Mr. McLeskey: The only claims that are made in these ordinances are in this case, and that is the gambling element.

Mr. Leach: If the court please, we are not claiming anything for these ordinances. The ordinances were enacted. The presumption of constitutionality is there. We are not

resting ourselves solely on the gambling aspects of the machine.

Mr. McLeskey: I thought so. Maybe I misconstrued it.

Q. Lieutenant, have you had any trouble with juveniles in regards to pinball machines? A. Yes, we have. In the 30 cases I mentioned, 22 of them, as I recall, were complaints of parents where the children were spending their money on pinball machines in preference to buying their lunch, and on investigation I found it to be true in 11 of the cases, I went myself and checked it.

Mr. McLeskey: Move the answer go out.

The Court: No. It may stay in.

Q. That wasn't necessarily gambling? A. No, no, it wasn't necessarily gambling.

Q. Well, from your experience on that and your other experience, have you an opinion as to whether or not these machines encourage loitering?

Mr. McLeskey: Object to the question.

The Court: Let him answer.

Mr. McLeskey: Note an exception.

The Witness: To a certain extent, yes. Children are amused by the lights flicking off and on, more or less, is what I see, is the way it looked to me from my experience with it.

Q. And from your experience, do you have an opinion as to whether or pinball games encourage gambling?

Mr. McLeskey: Object to the question.

Q. And I am confining my question to pin games not set up with free play.

Mr. McLeskey: Object to the question.

The Court: Let him answer.

The Witness: I am afraid I can't answer that, I wouldn't know for sure.

Q. And could you tell the court, not with regards to a particular location, but where these pin games appear, in what type of establishments? A. Confectioneries, places where young people congregate, drug stores, occasionally, and various establishments where people congregate to more or less of a degree.

Q. Would you say that the problems, if any, from a pin game in a laundry, would be the same as the problems of a pin game located in a confectionery? A. Oh, no.

Q. And why does it differ? A. Well, a man has idle time when he is in a laundry, I would say, and he might go over and play a game just for amusement purposes, for something to do while waiting, but in a confectionery it usually, the element of chance is there, and it is more or less of an attraction.

Q. Have you, through your experience, had occasion to play the machine? A. Yes, sir. Not very often, sir, not very often. I am a poor player, I lose very fast when I play, get nothing but dissatisfaction playing, usually.

Q. Are you familiar with the convertibility of a pinball machine from non-free play to free play? A. Yes. I have gone into establishments where the machines had no free play on them and maybe go back in three or four days and there would be free play on them simply by the attachment of a wire.

Q. Can you tell from the outward appearance of a machine whether or not it is set up for free play? A. No, not unless you would play it and examine it, is the only way you could find it out. It registers a score up in there,

where you get so many free games, then you immediately know it is on free play or replay.

Q. Do all free play machines have a free play meter or register on the backboard of the machine? A. They do.

Mr. Sherwood: Well, then, I move the answer to the previous question go out, because he said all it took was a wire.

The Court: Yes. Sustained.

Q. Are all machines with free play registers on the backboard set for free play? A. Repeat that question?

Q. Well, you stated that machines that give free plays have a meter or register on the backboard. Would that machine containing a meter or a backboard be rigged for free play?

Let me ask you this way, are they convertible, can you change from one to the other with the same machine? A. Yes, yes, it can be done.

Mr. Leach: That is all.

The Court: Cross-examination.

Mr. McLeskey: Just a moment.

Mr. Leach: Would you excuse me just a moment. I have one or two more questions.

Mr. McLeskey: Yes.

Q. Lieutenant, you mentioned that some machines are convertible from free play to non-free play. Are you familiar with how that is done?

A. No, sir, I am not. That takes an expert to do that, a man who repairs them, and most of these men have repairmen who can do it.

Q. You have never seen it done? A. No, sir, I have not.

Mr. Leach: That is all.

Cross Examination

By Mr. McLeskey:

Q. Lieutenant, there are about what, five to six hundred pinball machines in operation in Columbus? A. Sir, I don't know just how many there are.

Q. And you say that in the whole year 1953 you only had nine, made nine arrests? A. Made nine out of about 30 complaints.

Q. Yes, nine, and in 1952 you said you had 21? A. 21.

Q. Did you go off the vice squad in 1953? A. No, sir. I went off in 1954, the first month.

Q. Did you make any arrests in 1954? A. I went off the first month in 1954.

Q. First month in 1954? A. Yes.

Q. Mr. Cook was safety director when you were head of the vice squad, wasn't he? A. That is right, sir.

Q. When this first injunction was granted, Lieutenant, you and Mr. Cook arranged for parties of three, including, at least one woman in plain clothes, who went out West Broad street and went up High street place by place and endeavored to force merchants that had these machines to pay off, did they not? A. No, sir.

Q. And didn't you try to trap them by every way you could? A. No, sir.

Q. You mean to say that was not deliberately done? A. No, sir.

Q. You deny that? A. Yes, sir.

Q. Was there any woman in those groups? A. Had one woman.

Q. One woman? A. But for one specific place.

Q. Do you deny that you didn't go up High street in a group of three, place by place, or two, maybe? A. Well,

I attempted to take those machines that were paying off in the university district, yes.

Q. You said you were going to break that injunction by arresting every free play operator, didn't you? A. No, I didn't say that.

Q. Free plays were excepted from the injunction, weren't they? That is right, isn't it, free plays was excluded, nobody was enjoined from arresting a person engaging in free plays? A. No.

Q. No, and despite that effort in 1953, you say you made nine arrests and convictions and that's all? A. Yes.

Q. And before you went off, you made none in 1954? A. That was only about 28 days.

Q. In 28 days? A. Yes.

Q. But you were still trying, though, weren't you, Lieutenant? A. Yes.

Mr. McLeskey: That is all.

Redirect Examination

By Mr. Leach:

Q. Lieutenant, what is the size of the vice squad? A. We had about 10 men most of my time in there, about 10 men. Of course, that is split over 24 hours a day period.

Q. Was that enough men so that you could properly supervise? A. Not near enough.

Mr. Leach: That is all.

Recross Examination

By Mr. McLeskey:

Q. Did the safety director or chief of police give you some extra people when you were making the trips up High street and out Broad street? A. Only that one girl.

Q. Only that one girl? A. That's right. I used her for only one specific place.

Q. Is that true of these machines here? A. That is right.

Q. Well, there is no skill in billiards? A. Oh, yes, there is skill in billiards.

Q. There is skill in billiards but not skill in this machine? A. That's right.

Q. How do you differentiate it? A. By the construction of the two boards, that is, the billiard table and this board.

Q. Now, we have had experts here, real experts, genuine experts—

Mr. Leach: I object.

The Court: Yes, that is argument.

Q. —that have engaged in the manufacture and sale and operation of these machines for years and years; they took Plaintiffs' Exhibit A, over here—I mean Defendant's Exhibit A, over here, and played it, at least to my satisfaction, and showed it to be a game of skill.

The Court: That is Plaintiffs' Exhibit A?

Mr. McLeskey: Plaintiffs' Exhibit A, pardon me.

Q. Do you mean to say that those men, after all the years of experience, they are wrong about the operation of that machine? A. That is right. That is what I say.

Q. They are wrong? A. That is what I say.

Q. Although you never tried any one of these machines but that one experiment, they were wrong and you were right? A. That is right.

The Court: Let me ask you, Professor, did you try this exhibit?

The Witness: Exhibit A, the one on the left?

The Court: Yes.

The Witness: No. I have no knowledge of that at all.

The Court: Do you know they do have some control of the ball after they release it?

The Witness: Yes, I notice that, Your Honor.

The Court: Wouldn't that make a difference?

The Witness: Yes, sir.

Q. You don't know anything about where this Defendant's Exhibit 2 came from, do you? A. No, sir.

Q. You don't know where that came from? A. No, I don't know where that came from.

Mr. McLeskey: That is all.

The Court: Now, that machine was set up for payoff, was it not, or free play?

The Witness: Yes, it was.

The Court: And in that respect it differs from Exhibit A, does it not?

The Witness: I don't know whether this is set up for free play or not.

The Court: Well, the evidence is that it is not set up for free play or payoff on the machine itself.

The Witness: Well, then there is that difference.

The Court: And Exhibit 2 provides on its face there that certain scores will be rewarded by free plays, does it not?

The Witness: Yes, sir.

The Court: And the free play depends upon the score that is arrived at by the playing of the game?

The Witness: Yes, Your Honor, they do.

The Court: And whether it is chance or skill, if you reach a certain score you get some free plays?

The Witness: Yes, sir.

The Court: All right.

Redirect Examination

By Mr. Leach:

Q. Professor, does the free play feature of the machin that you tested have any relationship with whether it i skill or chance? Do you follow my question?

The Court: Of course, the answer to that is no, according to his testimony.

The Witness: I am sorry. I am afraid the answer to tha will have to be slightly different, because there are tw features we are talking about here, my testimony as to skil and chance has been only on the matter of placing the ball Now, the other features, that is, the improvement feature to improve the score, that is if I put in additional dimes o nickels, whatever this machine is set up for, after you again put in money and change the amount of payoff features and pay off, if you manage to get the balls in the proper line, but the amount of that improvement the operator cannot control at all; he can put in a nickel—I am speaking, now, o the machine, of course, that I tested—he can put a nickel in —that was a nickel machine—and he might get an improvement of 20, he could put in the next three nickels and get no improvement whatsoever, then he could put in a nickel and get an improvement of maybe 10, but he never could tell what improvement he was going to get and there was no sequence I was ever able to take off the machine repeated itself, it never did in all my playing, and it certainly would not to the ordinary player that comes in with a pocketful of nickels.

Mr. McLeskey: You are still talking about Defendant's Exhibit 2?

The Witness: The machine I tested, a similar machine.

Mr. McLeskey: Not even the same machine?

The Court: Yes. Let's proceed.

Q. My point, Professor, was this, the machine that you tested had a free play device on it, I believe? A. Yes.

Q. Did that free play device have anything to do with the plunger? A. Nothing whatsoever.

Q. Did it have anything to do with the results that you got, this dispersion plan that you mentioned? A. Nothing at all, that is why my report was in two parts and my testimony here in two parts.

Mr. Leach: I believe that is all.

Mr. McLeskey: Just a moment. I am for the record going to move to strike the professor's testimony from the record on the ground it has no probative value whatsoever; he is not talking about these machines.

The Court: He is talking about generalities.

Mr. McLeskey: Yes, generalities, not specific.

The Court: Now, I am not clear on this. As I understand it, you put in a nickel and get five balls; you said you put in more money, you get an appreciation, the appreciation is you get more balls; isn't that all? In other words, if you put a nickel you get five balls, put in another nickel, you get ten?

The Witness: No, sir. That is not the case. May I come to the machine and demonstrate?

The Court: Yes. I didn't understand what you meant. My understanding is there are only five balls in the machine.

The Witness: The operation of this machine similar to the one on Exhibit 2 here was this, I come up to the machine with my money, and I put in a nickel, and the lights light up, showing that the machine is ready for operation, and

a ball is placed up in the playing position; I then start to play or maybe I do not yet start to play, maybe I am not satisfied with the number of free games that I will get if I hit—suppose that I would be getting 10 free games if I hit 9, 10, 2 on the left-hand side of the playing card; I feel that I am a better gambler than that, and I don't want to settle for just 10 free plays, so if I would put in another nickel here, then something else would happen on this backboard; for example, the corner score 200 may light up, that is, if I get—I presume on this machine it means—well, I am not sure, Your Honor. I have to put the ball in then to get the benefit of 200, but if I hit, why, then I hit for more than 10, I am hitting for 40, and then if I put in another nickel I might light up the corner score 300, and then if I get that play, make my hit for 90, but when I put in a second or third nickel I may get nothing at all for my money, it just goes into the pocket and I take my chance, and I gamble on whether or not I appreciated my score.

Mr. McLeskey: I object to that "gamble". He has used it twice, "gamble". That is a conclusion here.

The Court: Well, now, you go up and put in a nickel and another nickel and you put in a third nickel, how many balls do you get to shoot with?

The Witness: Five, Your Honor.

The Court: You mean five per nickel?

The Witness: Five balls. No matter how many nickels you put in, you get five balls, and if you don't make a score with that five balls, all the money you put in is gone.

The Court: If the machine is not provided with a payoff, it is of no benefit to you, is it?

The Witness: That is right, and you get five balls for a nickel, time after time.

The Court: So that if there is no payoff, there is no object of putting in a second nickel to have some other lights up there on the board?

The Witness: That is the only reward, the lighting up of the board.

The Court: You haven't examined this board here, I take it, Exhibit A?

The Witness: No, Your Honor, I haven't had the chance to examine this.

The Court: The testimony is there is no payoff and the only thing you can do with that is to register a score?

The Witness: Yes, sir.

The Court: And no reward for any score?

Q. (By Mr. Leach) Professor, I would like for you to examine this for just a moment, Plaintiffs' Exhibit A. Does Plaintiffs' Exhibit A contain similar relative bumpers that are contained in the defense exhibit and also as were contained in the machine that you tested? A. I see a few that look to be the same, yes.

Q. Well, would you say that your testimony with regards to the former factor apply equally to the bumpers on the Plaintiffs' exhibit as applied to the bumpers on the machine that you tested?

Mr. Sherwood: Oh, I object to that, Your Honor. I don't think he can testify to that.

The Court: Not only that, but this is supplied with side flippers.

Mr. McLeskey: And look at the difference in the boards.

Mr. Leach: I am basing my question only to that bumper. I fully agree there is some flipper control, more flipper control on this machine than that, in Plaintiffs' Exhibit A, than in 2.

Guy Oddie,

called as upon cross examination, being duly sworn, testified as follows:

Cross examined by Mr. Leach:

Q. Would you state your name, please? A. Guy Oddi.

Q. Are you one of the plaintiffs in this action? A. Yes, I am.

The Court: Is that O-d-e-y?

The Witness: No, O-d-d-i-e.

Q. And what is your address, sir? A. My home address?

Q. Yes. A. 1864 South Sixth.

Q. And what business are you in, sir? A. Coin amusement device business.

Q. And being in such business, do you handle pinball machines? A. Yes, I do.

Q. Are they in substance the same as Plaintiffs' Exhibit A and Defense Exhibit 2, forgetting the free play aspect?

Mr. McLeskey: Now, wait a minute. Let's ask him about one game at a time. Object to that question.

The Court: Yes. They are not similar at all.

Mr. McLeskey: I think that is unfair.

The Court: Let's have one at a time.

Mr. McLeskey: This is Plaintiffs' Exhibit A, and this is Defendant's Exhibit 2. I thing that those questions should be separated.

Q. You handle devices such as Plaintiffs' Exhibit A? A. I imagine I do. I didn't see what it looks like out in front.

Q. Well, would you leave the stand and walk over and look at both of those machines?

Mr. McLeskey: This is Plaintiffs' Exhibit A.

The Court: No. It's the other way.

Mr. McLeskey: That's right.

The Witness: Yes, I have a few similar to this.

Mr. McLeskey: You are speaking, now, of Plaintiffs' Exhibit A?

The Witness: Yes. I mean, when I say "this", I mean similar to this; it may not have this, I can't recall that, but I seem to think we have a few of this.

Q. You are stating that you have a few of the machine similar as far as the playing field? A. Yes.

Q. And the background? A. Yes.

Q. Of Exhibit 2? A. Yes. As far as the type, I don't know if it is this type or not.

The Court: Do you have machines that pay off, free games?

The Witness: No, we don't have anything like that, sir.

Q. Where do you get your pinball machines? A. Well, various places; we buy them out of town and right here in town, both.

Q. Do you get them from the factory cased up? A. Well, some of them you do, some you don't.

Q. Well, when they are received, are they at that time set for free play or not? A. Well, it depends how you order them. I mean, if you buy them that way, if you don't they won't be that way.

Q. Have you ever received machines set up for free play when you received them? A. Oh, I can't recall right off when this machine came in, I am not in the office; when I order them I order them without free play on them. When they come in, if they have free play or not, I don't know. My boys at the office are required to have no free plays at all times.

Q. To your knowledge, have you ever received a machine with a free play on it? A. Yes, we have had machines years ago on free play. Just a minute ago, we were talking about that machine, we had four machines at that time, and they were all on free play; that was four or five years ago, but since that time we haven't operated a machine like that.

Q. You operate out of the city of Columbus? A. Oh, yes, we operate out of town, as far as 20, 30 miles; maybe out to Buckeye Lake, places like that.

Q. Do you have free play devices on any of the machines out of the city?

Mr. McLeskey: I object to that, now.

The Court: Yes, that is sustained. Only what happened in Columbus.

Mr. Leach: If the court please, I am not asking it for that purpose, I am asking it for another purpose.

Well, I will rephrase my question.

Q. Do you today, in your offices, convert machines from free play to non-free play, or vice versa? A. Do we today?

Q. Yes. A. Not to my knowledge.

Q. Can you convert a machine from free play to non-free play, or vice versa? A. Yes, I probably could, if I had to. I usually don't do that type of work on the machine, but I probably could if I had to. It is a hard job and a long job to do it.

Q. Who does that job? A. Well, we have a man that does that, a mechanic that is trained for that kind of work.

Q. How long would it take him to do it? A. Well, I don't know. I would say six or seven hours, probably, or similar to that.

Q. Did you testify before a hearing of city council last year some time relative to your operations? A. Yes, I did.

Q. Were you in that hearing asked how long it takes to convert a machine from free play to non-free play, or vice versa? A. I don't remember if I was or not.

Q. Do you remember stating that it would take five to ten minutes to convert one? A. No, I don't remember. If I said that, I must have been thinking of something else. It takes more than five, ten minutes.

Q. Are you familiar with Mr. Grace? A. Grace?

Q. Yes. A. Who is he?

Q. I don't know whether he is a party or not.

Mr. McLeskey: No.

Q. Mr. Grace, who also operates certain pinball games? A. Bill Grace?

Q. Yes. A. Yes, I know him.

Mr. Leach: That is all.

Examined by Mr. Sherwood:

Q. Say, Mr. Oldfie, while you are there, in our first suit, No. 187169, we had as one of the party plaintiffs a Jack D. Smith, who was not a party plaintiff in this last suit, we filed last year. Can you explain to the court why he is not in this last suit? A. Well—

Mr. Leach: I don't think that is a proper question.

Mr. Sherwood: I tell you why it is—well, all right. Make your objection.

Mr. Leach: I am objecting to that question. Did the court here the question?

The Court: Yes, I heard the question. I think he may answer it. I don't know whether it is material or not, I can't tell.

Q. Answer the question. A. Well, since then I was told.

Q. Not what you were told. A. Well, he sold out his coin-vending operation, and that is why he is not in this petition now.

Mr. McLeskey: He is not in business any more?

The Witness: No, he is not in business any more, that I know of.

Mr. Sherwood: That is all. I might explain, just to make this clear, Your Honor, to both you and Mr. Oddie, who may not have been in the court room this morning, that the reason I asked that question. Lieutenant Lashley testified that a machine belonging to—

Mr. Leach: Now, if the court please, I don't think Mr. Oddie has requested nor is entitled to an explanation, and I think the time for it is in the brief.

Mr. McLeskey: Well, he answered the question.

Mr. Sherwood: I didn't want the court to think I was asking a foolish question.

Mr. McLesky: Lashley this morning said he picked up a machine owned by one Mr. Smith.

Mr. Sherwood: Mr. Smith is no longer in business.

Mr. Leach: Excuse me, but Mr. Smith is a party to this action.

Mr. McLesky: In the first or second one?

Mr. Leach: No, in the first one.

Mr. McLeskey: Yes. We concede that.

Mr. Leach: All right.

Mr. Sherwood: That's all.

Mr. McLeskey: That's all.

Mr. Leach: Just a second.

The Court: Just a second, Mr. Oddie.

Mr. Leach: That is all.

The Witness: Is that all?

Mr. Leach: That is all.

The Court: Anything further? Do you have anything further?

Mr. Leach: Yes, sir, I believe—excuse me.

The Court: While you find out, we will have a little recess.

Mr. Leach: If the court please, I would like to have just a little bit of an extended recess by ten, fifteen minutes, if it is permissible.

The Court: Yes, sir. We will extend it till tomorrow morning; it makes no difference.

Mr. McLeskey: No, let's finish tonight.

And thereupon a brief recess was had.

(The hearing continued to the next day, Thursday, November 17, 1955.)

Morning Session, Thursday, November 17, 1955.

The Court: Are you gentlemen ready now?

Mr. McLeskey: We are, if Your Honor please.

Mr. Leach: The defense would like to call—excuse me, sir.

The Court: Go ahead.

Mr. Leach: Jack D. Smith, a plaintiff in Case No. 187169, as upon cross examination.

Mr. McLeskey: He is not in Case No. 2. He is not a party in Case No. 2.

The Court: Well, they are combined.

Mr. McLeskey: Yes, they are combined.

Jack D. Smith,

called as a witness upon cross examination, being duly sworn, testified as follows:

Examined by Mr. Leach:

Q. Would you state your name, please? A. Jack D. Smith.

Q. And your address? A. 193 South Cypress.

Q. And your business? A. Restaurant.

Q. Mr. Smith, I believe you were a party plaintiff in the case commonly referred to as G. D. Ferguson versus the City of Columbus, Case No. 187169 in this court, is that correct? A. I believe that is so.

Q. Were you at that time or have you ever operated in the pinball business? A. Well, my father did, and I run the business for him.

Q. Well, could you tell us briefly what your experience in that field has been? A. Well, we just put the machines in certain places, and we operated them, kept them in service, and that is about the—I don't know how far you want me to go.

Q. Well, I take it your father was the owner of the machine? A. Yes, he was.

Q. And you entered into agreements of some sort with merchants to permit the machines to be placed in their establishment, is that right? A. That is right.

Q. Did you work upon the machines yourself? I mean, are you a mechanic of any sort? A. Well, I wouldn't say I am a good mechanic, no. I know a few things about the machine, if the spring breaks or a ball gets stuck, just common sense would tell you, but I am not a mechanic on them.

Q. Would you tell the court, in the operation of that enterprise, the arrangement between you and the merchants? A. Well, usually—at the time we was in operation, usually it was a 50-50 proposition.

Q. And what do you mean by that, sir, 50-50 of what?

The Court: Each took half of the money that was taken in?

The Witness: That's right.

Q. Do you mean by that that if 50 nickels went into the machine each side would get 25 nickels? A. Well, what kind of machine are you talking about? I guess that is right, you are supposed to split the take, yes.

Q. Were any of those machines constructed so as to give free play upon a particular score?

Mr. McLeskey: Now, when? He has been in business quite a while. Let's fix a date.

The Witness: Well—

The Court: When were you in business, Mr. Smith, or your father?

The Witness: Well, from—it has been two years practically two years since we have been in business.

Mr. McLeskey: You mean you have been out of business two years?

The Witness: We have been out of the pinball business, but I do own my own machine at the restaurant.

Q. You still own and operate your own machine? A. Yes, but no others.

Q. Did you have, other than at the date of the filing of this action? A. Of this action?

Mr. McLeskey: Objection.

The Witness: Yes, we did have.

Q. Now, confining your answers to that proximate date around the filing of the action, did you have any machines with free play mechanisms? A. Yes, they had free play mechanism in it.

The Court: Were they operated for free play?

The Witness: I don't believe so. I don't remember at the time; it has been so controversial that at times they were legal, I don't exactly remember the time, whether they were on free play or not.

Q. From your experience, sir, were most of the games, pinball games, constructed so that they were susceptible of being adjusted to free play? A. They could have been put on free play. I imagine they could have been put on free play at that time, yes.

Q. Did you ever convert a machine from free play to non-free play? A. Well, I don't know if I could or not, to tell you the truth. I imagine. It has been so long ago since I did anything on a machine, personally.

Q. Well, do you remember whether you ever personally changed a machine from free play to non-free play? A. Yes.

Mr. McLeskey: Well, let's find out what you are talking about. You are referring about where a mechanism is on the machine and been disconnected or a machine without an installation and the installation of a mechanism? It's two different things.

Q. Would this be correct, sir, a machine could be constructed in such manner you would have to add something to the machine to convert it over to free play, would that be correct? A. Yes.

Q. Would this also be correct, assuming you had a device on the machine for free play, can you disconnect that device and still leave the device in the machine? A. Well, you could cut wires, probably, to any machine; you know, you could cut off anything off any machine, I believe. I am not exactly sure, and I will tell you the reason why, if I cut out something else, for all I know. I am not exactly sure of that point, sir.

Q. Well, could you tell me this, in your experience did you, yourself, or did you order it done, a machine to be shifted from free play to non-free play or vice versa? A.

Well, I think at one time or other—see, we used to be in business seven years ago or more, and one time or other we probably had a machine that was on free play.

Q. Do you know how long it takes to change it from free play to non-free play? A. With everything there and everything intact, I wouldn't know exactly how long. Some people—I mean, if they knew, if it was a good mechanic and knew everything about it and what to do and he done it before, why, I don't know exactly. It would take not too long, you know, I would say.

Q. All right. A. But if it wasn't set up, and they had to add things to it, it would take days to do it, probably.

Q. Now, then, sir, have you been connected with any machine, pinball machine, in the city of Columbus in the last two months that contained a free play mechanism? A. Yes.

Q. And where was that? A. That was in my own restaurant.

Q. In your own restaurant? A. Yes.

Q. And when was that? A. Well, it hasn't been too long; it was within the last month, I would say within the last month.

Q. Was that machine not only—did that machine not only contain the free play device but was it also set for free play? A. Yes, I would say so.

Q. And that is the only machine you have in your establishment? A. Yes.

The Court: Is it on free play now?

The Witness: Well, we—they took the machine, the vice squad, sir.

Q. Could you describe that machine to the court very roughly?

Q. Didn't you threaten people if they didn't pay off in those trips up High street? A. No, sir, I didn't threaten anybody.

Q. You know, do you not, that Cook told Windmiller and Ferguson here that he was going to drive them out of business? A. No, sir, I didn't know that.

Q. You didn't know that? A. No, sir.

Q. Did you or did you not know it to be a fact that there are many of these machines at home, pinball machines? A. Well, I have heard; I couldn't say from experience.

Q. I see. You don't know. Now, I believe you say you have never converted a machine from free play to non-free play at all? A. Right.

Q. That is a mechanic's job, isn't it? A. Right.

Q. It's a rather involved mechanic's job, or do you know? A. Can I quote what a mechanic told me?

Q. No, I am not interested in what a mechanic told you. I want to know what you say. Can you do it? A. Me?

Q. Yes. A. I am no electrician.

Q. And you say you aren't skilled in the playing of these games? A. No.

Q. You aren't skilled in the mechanical aspects of it? A. No, sir.

Mr. McLeskey: That is all.

Redirect Examination

By Mr. Leach:

Q. Lieutenant, have you ever talked with any of the plaintiffs in this action; you know the plaintiffs, who they are, as to the convertibility? A. The only man that I talked to is the man on South High street who had a plumbing business there that is now out of business, named Wottrig.

Mr. Leach: That is all.

Mr. McLeskey: That is all. Oh, say, I wanted to ask you one more question, Lieutenant.

Recross Examination

By Mr. McLeskey:

Q. In your operations in the vice squad, did you ever go down to 1804 South Parsons avenue, to a place called Cop's Lunch? A. No, sir, I never did.

Q. Do you know that one of your own fellow officers operates that place; you know that, do you not? A. I know a fellow by the name of Littrell.

Q. Yes, and there is a pinball machine in that place? A. That I couldn't say, sir.

Q. You never went down to find out? A. I went down after I was off the vice squad, but there was no pinball in there.

Q. At the time you were in the vice squad, did you know anything about the contract the city of Columbus had with a man by the name of Guy Oddi, out here at the airport, for the operation of one of these bowling machines?

Mr. Leach: I am objecting.

Mr. McLeskey: I am just asking him if he knows it.

The Court: Let him answer it.

The Witness: I knew that there was pinball machines out to the airport, and I went out and made one almost.

Q. Did you? A. Yes.

Q. Did you find out who it belonged to, who was operating it? A. No, the machine was broke.

The Court: When you say you made one almost, you made—

The Witness: The machine was broken.

Q. You mean you almost arrested somebody? A. In other words, you played the machine and it would give you a payoff constantly.

Q. But you did know at that time that the city of Columbus was interested in that operation? A. No, sir.

Mr. Leach: When was that?

The Witness: That was in 1952, I believe.

Mr. McLeskey: The contract was dated in 1950, expires in 1955.

The Witness: It was along in 1952, 1953.

Q. How many pinballs were out there at the time you were out there, Lieutenant? A. Three, I believe; three or four.

Q. Four, weren't there? A. Yes.

The Court: I still couldn't understand, when you say you made one almost, you mean you almost made an arrest, or fixed the machine?

The Witness: Can I explain it, Judge?

The Court: Yes.

The Witness: The machine went haywire, and you didn't have to put any money in it to play it, and the people were calling in and said they were paying off in free play.

The Court: All you had to do was play it?

The Witness: All you had to do was play it, yes, there was no investment.

Q. In other words, it was broken? A. Yes.

Q. Now, were all of them broken? A. No, just the one.

Q. Just the one? A. And that is the one I was interested in, because they said it was paying off.

Q. They were in a room just east of the waiting room, weren't they, Lieutenant? A. They were in the waiting room.

Q. They were in the waiting room? A. Yes.

Q. The rest of them were being played except the one? A. Yes, they were being played.

Q. But there were no replays at that time, or were there? A. Only that one machine, and it was broken.

Mr. McLeskey: That is all.

Redirect Examination

By Mr. Leach:

Q. Lieutenant, was that a coin-operated bowling machine? A. I didn't see any bowling machine at that time, I did see a pinball machine.

Q. There is some distinction between a bowling machine and a pinball machine? A. Yes, I believe there is quite a bit.

Mr. Leach: That is all.

Recross Examination

By Mr. McLeskey:

Q. They are both table machines? A. Yes, they are both table machines.

The Court: Isn't the object the same, to get a high score, to see how good a score you can make?

The Witness: The bowling machine registers the score you can make.

The Court: Yes. That is the object of playing, to see how much of a score you can make.

The Witness: Yes.

Q. The same thing is true with a shuffleboard game, isn't it, Lieutenant, it is the same principle to see how high a score you can make? A. There is competition on a shuffleboard.

Q. You can have competition on a pinball machine? A. Very seldom did I see it.

Q. Two people playing on the pinball? A. I never seen it.

Q. As the court said, bowling alley and tables of that kind, they are all the same, played on a table, aren't they? A. Yes, to some degree.

Mr. McLeskey: That is all.

Redirect Examination

By Mr. Leach:

Q. Would you say, Lieutenant, that the skill factor is the same in those machines? A. No, no. Shuffleboard and bowling is a little bit different; there is skill involved in that than there would be in pinball; pinball is the element of chance.

Recross Examination

By Mr. McLeskey:

Q. Now, Lieutenant, while you were on the vice squad, you didn't make any effort to keep people from gambling on the golf games, did you, betting so much on a hole, did you?

The Court: That is a little bit out of your jurisdiction?

The Witness: I am not a golfer.

Q. Well, let's get in town, let's take billiard games.

The Court: No golf courses in town.

Q. Let's take billiard games, did you make any arrests of people playing billiards? A. We don't know whether they were gambling or not.

Q. The same thing was true of gambling on a baseball game, you don't make any effort to try to stop that? A. I sure do.

Q. Did you ever arrest anybody for gambling on a baseball game? A. Baseball pools?

Q. Baseball pools. You have? A. Yes.

Q. What about football pools? A. Yes, I have made arrests.

Q. Have you made arrests on betting on the Ohio State games? A. On the pools, yes.

Q. Suppose Mr. Sherwood and I were betting on Michigan next week, $50 apiece each way, you mean to say you would arrest me if we did that, would you? A. You would not tell me.

Q. Well, I might, I probably would. A. I doubt it.

Q. You people single out pin games and put them in the class and you singled out no other type of gambling?

Mr. Leach: If the court please, the city council passed the ordinance—

The Court: This is in the nature of argument.

Mr. McLeskey: This first and second ordinance is wide enough to cover anything that registers a score.

Q. You gentlemen don't, of course, mean to say that you try to arrest the operation of every game that registers a score?

Mr. Leach: If the court please, I again object.

The Court: Let him answer.

The Witness: It would be impossible.

Q. It would be impossible, certainly. A. With 10 men, you couldn't begin to cover the city.

Mr. McLeskey: That is all.

Mr. Leach: That is all.

The Court: If you had a thousand men, you still couldn't cover it.

Mr. McLeskey: No.

Mr. Leach: I would like to call Guy Oddie, a plaintiff in this case, for cross examination.

Mr. McLeskey: Mr. Oddie.

The Court: I am going to let him answer.

Mr. McLeskey: Note exceptions.

The Witness: Well, most of it is luck. Some skill, a very small amount of it would be skill.

Q. Are there methods of adjustment within the machine itself to increase the hazard or to make it less likely to get a high score? A. Yes.

Q. And how would you go about doing that, sir, what various things are there that you can do it? A. Well, there is a lot of different ways you can do it, put nails or pins in a board locking the hole when it is a hole that the ball falls in, or bumper spring, they can set them closer to the hole, when the ball hits it bounces away from it instead of going into it.

The Court: Well, that depends on the construction of the board?

The Witness: Whether it is an old board.

The Court: Yes.

Q. Now, then, sir, are you familiar with the pin games with regard to gambling on them?

Mr. Sherwood: I object to that. He hasn't been in business for three years.

The Court: Yes, I will sustain the objection.

Q. Mr. Warner, in your opinion, would a pinball game constructed without a free play device at all be a profitable venture?

Mr. McLeskey: Object to the question.

The Court: Sustained.

Mr. McLeskey: That is purely speculative.

The Court: Sustain the objection.

Mr. McLeskey: We have produced people who experienced it.

Mr. Leach: If the court please, the question I am asking are almost identical to the questions asked by the plaintiff of its witnesses, who are also operators of pinball machines.

The Court: They were not basing it on opinion, they were basing it on fact.

Mr. McLeskey: Fact, that is the difference exactly.

Q. All right, sir. Do you know, sir, whether or not pinball games can be profitably operated without free play devices or payoffs?

Mr. McLeskey: Just a moment; I will object to that.

The Court: I will sustain the objection.

Mr. Leach: Now, if the court please, I didn't ask any information except whether or not he knows.

The Court: You asked him if he knows. Now, we have had witnesses who testified that they did.

Mr. Leach: Well, he may, but I am not able to find out whether he does.

The Court: You bring people in here who are now operating. He has been out of business, he says, for the last three years.

Q. Mr. Warner, do you know the plaintiffs in this action, and I will read them, G. G. Ferguson? A. Yes.

Q. Ray Benjamin? A. Yes.

Q. Emil Wladimiller? A. Yes.

Q. Paul Chapman? A. Yes.

Q. Guy Oddie? A. Yes.

Q. Jack Smith, Jack D. Smith, 76 East Town street? A. Yes.

Q. Morris Siegel? A. Yes.

Q. Lawrence Shankman? A. Who.

Q. Lawrence Shankman. A. I don't know. Who is he connected with?

Q. I don't know, sir. A. I don't know that name.

Q. Michael Cherry? A. Yes.

Q. Kenneth Kelsey? A. Yes.

Q. Sarkis Anthony? A. Yes.

Q. Have you had business relationships with them with regard to pinball machines? A. I put them all in business when they first started.

Q. You mean as distributor? A. That's right.

Q. You supplied them with their machines? A. First ones they ever owned.

Q. How long has it been since you supplied machines to those parties?

Mr. Sherwood: I object to that. He says he has been out of business three years, so it would have to be previous to these ordinances.

The Court: Well, that wouldn't be material.

Mr. Leach: If the court please, if he supplied them three years ago, I think that is pertinent.

The Court: Why?

Mr. McLeskey: Oh, no.

Mr. Leach: For this reason, sir, a police regulation is passed to prohibit a particular evil, now, whether or not there is an evil or whether there is not an evil, can, of course, be disputed, but to me the validity of this ordinance ties up very much to what was the pattern at the time of the enactment of the ordinance.

The Court: What we are interested in, now, is the present, not what was two or three years ago

Mr. McLeskey: This is a court of equity, and the court of equity acted as of the present time, is my understanding of the rule. That is the difference between law and equity as I understand it.

Mr. Leach: I realize that, but I think that there is, of course, conduct and a pattern that is relevant to this issue.

Mr. Sherwood: Not when the man has been out of business three years.

Mr. Lach: If the machine he sold was still being used, I think it is.

The Court: The evidence is that the machine now being used, with the exception of the one Jack Smith had, none of them are free plays. Now, that is the evidence. It doesn't make any difference what they were three years ago or ten years ago. As I understand the evidence, there was a time when free play was recognized as all right as long as it was confined—

Mr. McLeskey: And in some jurisdictions still, if Your Honor please.

Q. Of your own knowledge, sir, do you know the manufacturers of pinball machines and of slot machines presently in existence?

The Court: Now, we aren't interested in slot machines.

Mr. McLeskey: They are not in the case.

The Court: Only interested in pinball machines. Is there any dispute who the manufacturers are?

Mr. McLeskey: Not so far as I know. If Your Honor please, we are certainly making no point of who the manufacturers are.

The Court: The names are on these boards?

Mr. McLeskey: Yes.

Mr. Leach: If the court please, in the plaintiffs' case there was evidence presented that the present manufacturers of pinball machines were not associated with the slot machine racket.

Mr. McLeskey: Well, there is no slot machine racket now. Manufacturers now--

Mr. Leach: Well, would you permit me to find out that?

The Court: It might be a matter of interest, but it has no relevancy in this case.

Mr. Leach: It was brought in by the plaintiff.

Mr. McLeskey: This is not a slot machine case.

The Court: It is not relevant at all.

Q. Have you, sir, had any conversation with any of the plaintiffs that I named to you a moment ago with reference to pin games since 1953?

Mr. McLeskey: I object to the question.

The Court: Oh, he can answer yes or no.

The Witness: Some.

Q. Were any of those, or any of those conversations the convertibility or the free play of pinball machines discussed?

Mr. Sherwood: Oh, I don't think that is relevant, Your Honor.

The Court: I will sustain the objection. It could only be possibly used for grounds of impeachment and you laid no ground for it.

Mr. Leach: I think, sir, it could be more so than impeachment; I think it could be used as a statement against interest.

Mr. McLeskey: I think we had a right to be asked whether or not such a conversation took place and what was said.

Mr. Leach: That is what I am trying to get at.

Mr. McLeskey: I said you should have laid a foundation with our witnesses for it.

Mr. Leach: I don't have to lay a foundation for statements against interest.

Mr. McLeskey: The court has ruled.

Q. Well, was the aspect of gambling upon pinball machines discussed with you by any of these plaintiffs?

Mr. McLeskey: I object to the question.

The Court: I will sustain it.

Q. Have you any knowledge as to the present operation of the pinball machines in the city of Columbus today?

Mr. McLeskey: Object to the question.

The Court: Yes, I will sustain it.

Mr. McLeskey: Even though he might answer yes, sir.

Q. Have you seen the pinball machines that are presently in the various establishments in the city of Columbus today?

Mr. McLeskey: Oh, I object to that, if Your Honor please.

The Court: Oh, let him answer.

The Witness: Yes.

Mr. McLeskey: Note an exception.

Q. Do you know whether any of those machines were owned and operated by any of these plaintiffs?

Mr. McLeskey: I object to the question.

The Court: He may answer.

Mr. McLeskey: Note an exception.

The Witness: Yes.

Q. Have you had occasion to see or examine those machines so that you would know what features they had?

Mr. McLeskey: Object to the question.

The Court: Yes, I am going to sustain it, too far afield here in generalities now. If you have any specific machine that somebody knows is illegally oper. ed, that is one thing, but just asking general questions is not proper.

Mr. Leach: If the court please, this su[illegible]s not involve a particular machine at a particular establishment, it involves pinball machines in general in the city of Columbus.

The Court: Oh, it isn't necessary at this time. It's a pinball machine. I don't think it is necessary; it will encumber the record with the description.

Q. Back at the approximate date of the filing of this action, when you were operating with merchants, did you have any arrangement with them with regard to free plays or with regard to payoffs? A. Any arrangement—I mean, you are asking me if they were on free play or not or on payoff?

Q. Yes. A. No, they were not, as far as I know.

Q. Did you have any arrangement with the merchants with regard to payoffs on high scores? A. No.

Mr. Leach: That is all.

Direct Examination

By Mr. McLeskey:

Q. Mr. Smith, you went out of business sometime between the filing of Case No. 1, here, and Case No. 2? A. Yes, that's right.

Q. About two years ago? A. That is correct.

Q. This machine that you have, you say, is your own machine? A. That is right.

Q. You didn't get that from any operator? A. No.

Q. Now, you say that machine had been used for free play, is that correct; did you say that? A. That's right.

Q. Why did you use it for free play? A. Well, I was—I thought it was very controversial, I didn't know exactly if it was against the law or not, and I still don't know.

Q. You don't know yet whether it is against the law or not, do you? A. I don't know. If it is, I will not ever do it again, but I don't know if it is or not.

Q. Who represents you? A. Clarence Sullivan, but he is sick today, he can't be here.

Q. Now, this machine you say was brought in by the vice squad. Are they charging you with free play, is that what the charge is? A. That's right.

Q. And the whole issue is whether or not free play is or is not legal, is that right? A. Yes, that's right.

Q. Are you defending that case, Mr. Smith? A. Well, it has been continued. It hasn't come up yet.

Q. Have you entered a plea in the case? A. Not guilty.

Q. Plea of not guilty? A. Of a gambling device.

Q. Of having a gambling device, is that it? A. Yes, that's right.

Mr. McLeskey: I think that is all.

The Court: Let me ask you this, Mr. Smith, supposing one of your patrons plays that machine and gets ten free plays or five free plays, did you pay him for anything or did he just play?

The Witness: There was nothing tangible given to anybody, no officer of the law or no person.

The Court: He just got the privilege of making a free play?

The Witness: That's right.

Mr. McLeskey: In other words, all you did was to give him the right to make free plays?

The Witness: Yes.

Mr. McLeskey: Nothing else?

The Witness: That's all.

Mr. McLeskey: That is all.

Cross Examination

By Mr. Leach:

Q. Mr. Smith, you permitted that machine to be used in your place with a free play mechanism? A. Yes, sir.

Q. Does that stimulate an interest in the game? A. Well, that is very controversial. It is a skill game. I mean, if

you shoot the ball and get it in the right holes, it is something to occupy the person's mind, and there is no minors involved. In fact, any operators I know ever let a minor play knowingly, he would walk up to the machine and the merchants would have to go up and tell him not to, which I think is the main thing.

Q. What I am asking you is, would a machine with a free play device get a better, more patronage than a machine without the device? A. Well, we have to satisfy their—I mean, you have to put a machine in a place and try it for a while on one machine and then on another.

Q. Did you ever have machines in your restaurant without a free play on them? A. Well, we have had all kinds of machines, Bally machines and basketball—you know what I mean, one machine goes better than another machine. We have never tested a single machine to find out.

The Court: Does it depend more on the novelty of the machine than it does on the free play or anything?

The Witness: It depends on the person who is playing it, if he likes to play the machine, he is going to play it regardless, that is what I would say.

Q. Taking you back to the time when you actually operated these machines, were any of your merchants with whom you had contracts arrested for gambling back at that time for owning the machines?

Mr. McLeskey: I will object to that.

The Court: Yes, sustained.

Q. Did you, during this time, pay any attorney fees for any merchants?

Mr. McLeskey: I will object.

The Court: Yes, sustained.

Mr. McLeskey: Don't answer that.

Mr. Leach: That is all.

The Court: Anything further?

Mr. Leach: Mr. Warner.

R. H. Warner,

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Examined by Mr. Leach:

Q. Would you state your name, please? A. R. H. Warner.

Q. And your address, sir? A. 84 South Cassidy.

Q. And your occupation or business? A. Cigarette vending machines.

Q. Does that business involve the operation of coin-operated cigarette devices? A. That is correct.

Q. Mr. Warner, have you ever operated in the coin-operated pinball business? A. I have.

Q. And when was that? A. Oh, I would say around 20 years up till the last couple or three years.

Q. You mean for the last 20 years except for the last three years? A. Yes.

Q. In what capacity did you operate? A. I bought them from the factories and sold them and operated them, put them out on location.

Q. You mean you acted as a distributor and also as an operator? A. That's right.

Q. Are you familiar with the various types of pinball machines that you handled and that are handled today? A. That is correct.

Q. Could you generally describe the various types of pinball machines, just briefly?

Mr. McLeskey: Now, just a moment. Why clutter the record?

The Court: Yes. That has been described. There is no change. You don't expect to show anything different.

Mr. Leach: If the court please, there is a law question in my mind from the evidence whether the petition or the evidence has confined itself to, for example, Plaintiff's Exhibit A, or whether we are talking about pinballs in general, and if we are talking about pinballs in general, I would like to present evidence that there are various distinctions.

The Court: That is already in, the various types, and some have free play, some don't.

Mr. McLeskey: They are all on the somewhat general principle.

Q. Are you, Mr. Warner, familiar with the three play type of pinball machine? A. All those machines are free play; they are all built at the factory with free play units.

The Court: Well, they are not equipped for free play, are they?

The Witness: Oh, yes, all of them are equipped with free play units when they are manufactured, if they didn't they couldn't sell them.

Q. Are you familiar with the free play device within the pinball machine? A. It is just a scoring unit which registers free games.

Q. Could you describe to the court in your own words what it looks like or how it fits into the machine? A. Well, it just works on the points just as a meter that records the games.

Q. Where is that meter located? A. Usually in the back.

Q. Is it visible from the outside? A. Yes.

Q. There you have stated that the machines are all equipped with free play device. Can that device be con-

nected or disconnected? A. Just the same as turning the switch on for a light bulb, you screw it out, it goes out, you screw it in, it burns; it has the same principle as that. In other words, they advertise, the manufacturers advertise that you can take it off and on.

Mr. McLeskey: What manufacturers advertise? I will object to that.

The Court: I will sustain that.

Mr. McLeskey: What you know, not what the manufacturers say.

Q. Would you describe to the court, assuming that you have a pinball machine with a free play mechanism built into the machine, how you could change that machine from free play to non-free play? A. Oh, just taking a coin wrapper and sticking it between the points; it takes about three or four seconds.

Q. Would it take any particular mechanical ability to perform that task? A. No. The instructions come with all the machines.

Q. Have you, in your experience, sir, ever seen a pinball machine not containing a free play mechanism? A. Yes.

Q. How many in the vast majority of pinball machines, how many would be so constructed?

Mr. McLeskey: Oh, I object to that.

The Court: I will sustain it.

Mr. McLeskey: That is purely speculative.

Q. Is the object of this game or at least the general object to attempt to get a high score? A. Sure.

Q. Have you played these machines? A. Yes.

Q. Have you an opinion as to whether or not this is a game of skill or a game of chance?

Mr. McLeskey: I object to the question.

Now, if the court requests that we go out and examine each pinball machine or bring in each pinball machine, we could do that, but I don't think that that is the issue in the case.

The Court: The issue in the case is whether or not the pinball machine which has no free play or no payoffs or no awards for high scores, whether or not that may be prohibited by the city council and ordinance. That is the issue.

Mr. Leach: If the court please, that is the issue of law this court will have to resolve, and I agree with that; however, factually the plaintiffs have alleged that their machines in fact do not contain free play mechanisms, and they have so testified, and we have denied that in our answer, and we would appreciate the opportunity to prove that to be not the fact.

The Court: Well, do you have any specific evidence, some definite machines, that you know some of those plaintiffs own that are being used for free plays? Let's hear it and not a blunderbuss question if he knows of some machine being illegally operated.

Q. Mr. Warner, do you know of any specific machines owned by these plaintiffs presently in the city of Columbus with free play mechanisms in the machines?

Mr. McLeskey: Still object.

The Court: Wait a minute. That is where the free mechanism is working, in use.

Mr. Leach: If the court please, one of our ordinances provides that it is against the law, a type of machine which has a free play device or that is readily convertible to free play. I think that is an issue, sir.

Mr. McLeskey: I don't agree with you on what the ordinance provides, Mr. Leach. It says "can be readily convertible into a gambling device".

Mr. Sherwood: I don't think free play is mentioned in the ordinance.

Mr. Leach: Well, if the court will bear with me just a moment.

The Court: All right.

Mr. McLeskey: Here we are. I call your attention to Section 29.38, Mr. Leach, which refers to machines which tend to encourage gambling, which register scores and which encourage gambling, such machine, device or instrument.

Mr. Leach: If the court please, I would like to read just a portion of Section 29.42, which says, "For the purpose of this section, 'gambling device' shall mean and include any device having an automatic payoff or automatic free play mechanism or any device readily convertible to automatic payoff or free play by slight changes or addition to the mechanical structure."

Now, I am asking whether or not, of this witness' knowledge, there are any machines of the plaintiffs containing mechanisms for free play, and I don't mean whether they are turned on or turned off.

Mr. McLeskey: Now, wait a minute. Let's read all that, Mr. Leach.

The Court: Yes.

Mr. McLeskey: It refers to actually used. This whole ordinance is based upon use—or any coin or token-operated device actually used for gambling devices.

Mr. Leach: That says, " or any coin".

Mr. McLeskey: Are you taking the position that it is a crime in this town to have a pinball machine with a free-play mechanism that is not used?

Mr. Leach: I most certainly am.

Mr. McLeskey: Oh, I disagree with you entirely.

Mr. Leach: I would like to say this to the court, if the court please, we have got an ordinance here or a series of ordinances which prohibit certain features on devices. We have got a factual difference as to what the present machines do contain; consequently, the court has a legal question of whether or not legally we could prohibit it even if it did contain it.

Now, I think it is very material to this case that we present the facts so that the court knows what is in these machines, and then the court can take up the question of the law, whether our ordinance has gone too far or whether it has not, but our ordinance does say, and it is in the alternative, that you cannot have a device with an automtic payoff on it, or readily adaptable to that.

Mr. McLeskey: And used.

Mr. Leach: Not "and used", or used.

Mr. McLeskey: I want to call the court's attention—I suppose you will concede the statutes are superior to ordinances?

Mr. Leach: I will not.

Mr. McLeskey: Listen to this, if Your Honor please, R. C. 715.51, that is G. C. 3659, reading, "Any municipal corporation may authorize the destruction of instruments or devices used for the purpose of gambling." "Used" is in there, "for the purpose of gambling." Now, you can't have an ordinance in violation of that statute. That is right there, and I never asked you to answer that, Mr. Leach.

Mr. Leach: I will answer that right now. I think, Mr. McLeskey, and the court is familiar with the case of ———— versus City of Columbus, recently decided by the Supreme Court of Ohio, which said this, in effect, and it is

not new law, that the city of Columbus cannot prohibit that which the state permits; that the city of Columbus cannot permit that which the state of Ohio prohibits.

Mr. McLeskey: That is elementary.

Mr. Leach: But that merely because the state does not prohibit an act does not mean that the city of Columbus cannot prohibit an act. The statute just read by Mr. McLeskey permits us to destroy machines for gambling, it does not prohibit us from destroying other machines; there is no license aspect to that at all.

Mr. McLeskey: If the statute says you may only do thus and thus and so, if that is not in conflict, I don't know what it takes to make one. The statute says you may confiscate a machine if it is used for gambling; here you say you can confiscate regardless of what use—

Mr. Leach: In regard to the numbers game, I am not too sure that it exists today, but it used to be the state of Ohio prohibited gambling by way of numbers, it did not prohibit the mere possession of number slips; the city of Columbus by a mere ordinance made the possession of number slips a misdemeanor, and that has been upheld time after time after time.

The Court: They are not analogous at all, they are entirely different.

Mr. Leach: Well, if the court please, I asked a question some time ago which I would like to ask again.

The Court: I have sustained the objection, as I recall.

Mr. Leach: Well, you didn't to my last question, I don't believe, sir.

The Court: Well, all right.

Mr. Leach: Perhaps you want to, anyhow, but my question was, "Of your own knowledge, sir, are there any pinball

machines in the city of Columbus owned and operated by the plaintiffs which have an automatic payoff or automatic free play mechanism within the machine?"

Mr. McLeskey: I object to that.

Mr. Sherwood: Object to that.

The Court: I will sustain that. You haven't asked enough.

Mr. McLeskey: No use shown.

Mr. Leach: Have you, Mr. Warner, personally seen any devices owned and operated by the plaintiffs in this action in the city of Columbus in the past year and a half, which machines not only contained automatic payoff devices but were set for automatic payoff?

Mr. McLeskey: Oh, I object to that. No showing of use.

The Court: You haven't completed your question. To make it proper, there has got to be use.

Mr. Leach: Have you, sir, in the last year and a half seen machines owned and operated by the plaintiffs in this action in the city of Columbus which contained automatic free play mechanisms or turned on so that the free play mechanism worked and were operated?

Mr. McLeskey: I object.

The Court: Oh, let him answer.

Mr. McLeskey: Note an exception.

The Witness: Well, I could not answer that, because I never played any.

The Court: Well, now, that is the answer. What is the next question?

Mr. Leach: I have no further questions.

The Court: Any cross examination?

Mr. Sherwood: No.

Mr. McLeskey: No cross.

The Court: You are excused. Who's next?

Mr. Leach: We have no further witnesses, if the court please.

The Court: You rest, do you?

Mr. Leach: Yes.

Thereupon the defendant rested.

Mr. McLeskey: Then, the plaintiffs rest in rebuttal. Nothing further, Your Honor.

And the foregoing was all of the evidence offered, introduced and admitted on behalf of the plaintiffs, and on behalf of the defendant, on this trial of this cause.

The Court: If you want to file anything further, you may do so in the next couple of weeks.

And thereupon on the thirteenth day of October, 1956, the following "Proffer of testimony" was filed herein, which said "Proffer of testimony" with the caption omitted is in the words and figures following to-wit:

"Proffer of Testimony

"Now comes the defendants-appellants and say that had Mr. R. H. Warner been permitted to answer the following questions, his answers would have been substantially as follows:

"R. 241—Q. Now, then, sir, are you familiar with the pin games with regard to gambling on them? A. I am. Naturally such games are often played without gambling considerations. On the other hand, either by pay-offs, free play, or bets between players, the machines are often used for gambling.

"R. 241—Q. Mr. Warner, in your opinion, would a pinball game constructed without a free-play device at all be a profitable venture? A. This would depend. If the machine were located in a spot where people congregate

and must wait a period of time—for example, a bus depot, such machines even if strictly supervised could be profitable. On the other hand, a machine without free-play and operated without pay-offs or side bets, would not be profitable in the average business establishment.

"R. 242—Q. All right, sir. Do you know, sir, whether or not pinball games can be profitably operated without free-play devices or pay-offs? A. Yes, I know that as a business they could not be profitably operated.

"R. 243—Q. How long has it been since you supplied machines to those parties? A. Four or five years.

"R. 245—Q. Of your own knowledge, sir, do you know the manufacturers of pinball machines and of slot machines presently in existence? A. I do. Inasmuch as the slot machine manufacturing has been almost discontinued, many former manufacturers of slot machines are now manufacturing pinball machines.

"R. 246—Q. Were any of those, or any of those conversations the convertibility or the free-play of pin-ball games discussed? A. Not that I remember.

"R. 247—Q. Well, was the aspect of gambling upon pinball machines discussed with you by any of these plaintiffs? A. Not that I remember.

/s/ Chalmbers P. Wylie, City Attorney
/s/ Russell Leach, Chief Counsel
Attorneys for Defendants-Appellants"

And thereupon on the thirteenth day of October, 1956, the following "Stipulation" was filed herein, which said "Stipulation" with the caption omitted is in the words and figures following, to-wit:

"Stipulation

"It is hereby agreed and stipulated by and between the parties through their counsel:

"1. That the above causes be joined for the purpose of submission of evidence.

"2. That the transcript of proceedings before the Honorable Dana F. Reynolds, judge, Court of Common Pleas, filed in this court on October 2, 1956; the stipulations therein contained; and the proffer of testimony filed in this court on the thirteenth day of October, 1956, shall constitute the evidence before this court on the appeals.

"3. That the answers of Mr. R. H. Warner contained in said proffer would have been his answers had he been permitted to answer the particular questions.

/s/ Chalmbers P. Wylie, City Attorney
/s/ Russell Leach, Chief Counsel
Attorneys for Defendants-Appellants
/s/ W. B. McLeskey
/s/ Owen Sherwood
Attorneys for Plaintiffs-Appellees"

And thereupon the Honorables Lehr Fess and Clyde L. Deeds of the Sixth District and Oscar Hunsicker of the Ninth District, sitting by designation, rendered their written opinion in said causes on the seventh day of February A. D. 1957, which said written opinion is on file among the court papers herein.

And thereupon on the issues joined the court entered up judgment in favor of the defendants-appellants and against the plaintiffs-appellees appears from said entry filed on the eighteenth day of March A. D. 1957, which

said entry with the caption omitted is in the words and figures following, to-wit:

"Entry

"The parties having stipulated (1) that the above entitled cause be joined with Cause No. 5530 for the submission of evidence, and (2) that the transcript of the proceedings in the Court of Common Pleas, and the stipulations therein contained, together with the proffer of testimony filed in this court on the thirteenth day of October, 1956, should constitute the evidence before this court in each of said causes, the above entitled appeal on questions of law and fact came on to be heard, together with said Case No. 5530, was argued by counsel and submitted to the court.

"Upon consideration whereof, the court being fully advised in the premises, finds and declares from the evidence adduced that Ordinances Nos. 156-53, 157-53 and 1615-54, enacted by the council of the city of Columbus, Ohio, and each of them, are not in contravention of either Article I. Sections 1 and 16, nor of Article III, Section 1 of, or the 14th Amendment to the Constitution of the United States, nor in contravention of any other article or section of or amendment to either of said constitutions and that said plaintiffs are accordingly not entitled to an injunction restraining the enforcement of said ordinances or either of them.

"It is, therefore, ordered, adjudged and decreed that the temporary restraining order heretofore issued in the above entitled cause be and the same is hereby dissolved; that the petition be and the same is hereby dismissed at plaintiffs' costs; that judgment in said cause be, and the same is, hereby rendered for the defendants for costs; and that said

cause be and the same is hereby remanded to the Common Pleas Court for execution for costs.

"To all of which rulings, orders, decrees and judgments of the court said plaintiffs, and each of them, except.

"Plaintiffs having advised the court that they desire to appeal said cause on questions of law to the Supreme Court of Ohio, it is, therefore, ordered, adjudged and decreed that pending the determination of said appeal the execution of the judgment heretofore rendered herein by this court be and the same is hereby stayed upon the following conditions, to-wit:

"1. That the plaintiffs shall abide by and perform the orders and judgments of said Supreme Court of Ohio.

"2. That said plaintiffs will pay all money, costs and damages which may be recovered or awarded against them by said Supreme Court upon the final determination of said appeal; and

"3. That said plaintiffs give bond to the satisfaction of the clerk of this court in the sum of $50.00.

/s/ Oscar Hunsicker
/s/ Lehr Fess
/s/ Clyde L. Deeds
Judges

Approved:

/s/ Owen B. Sherwood
/s/ McLeskey & McLeskey
Attorneys for Plaintiffs-Appellees
/s/ Russell Leach
City Attorney
Attorney for Defendants-Appellants"

To all of which rulings, orders, decrees and judgments of the court against said plaintiffs-appellees in the consideration of this cause, the said plaintiffs-appellees, and each of them, at the time excepted and still excepts, and on the twenty-second day of March A. D. 1957, filed this their joint and several bills of exceptions in said cause.

And thereupon the clerk of said court having forthwith notified the defendants-appellants of the filing of this bill of exceptions and no objection or amendment to said bill of exceptions having been filed by said defendants-appellants, said clerk on the first day of April A. D. 1957, presented to the court this bill of exceptions for allowance and signature by said court as provided by statute.

And thereupon the court received this bill of exceptions on the second day of April A. D. 1957, and said court did on the nineteenth day of April, A. D. 1957, certify that the foregoing was all of the evidence offered, introduced and admitted on this trial of this cause and did allow, sign and seal this bill of exceptions as provided by statute, and did immediately transmit the same to the office of the clerk of said court to be made a part of the record herein but not spread at large upon the journal according to the statute in such case made and provided, all of which is accordingly done as of said January Term A. D. 1957 of said court.

Oscar Hunsicker
Lehr Fess
Clyde L. Deeds
Judges of the Court of Appeals

PLAINTIFF'S EXHIBIT B.

Contract

This agreement made this 30th day of August, 1950, by and between the City of Columbus, Ohio, acting by and through its Director of Public Service, Elmer A. Keller, duly authorized representative, party of the first part, and G. O. Coin Service, 429 South 4th Street, acting by and through Guy Oddi, its duly authorized representative, party of the second part, Witnesseth:

That for the consideration herein after stipulated, the party of the first part hereby grants to the party of the second part, the right and privilege to operate and maintain what is known as a coin operated bowling machine in the airport terminal building at the Columbus Municipal Airport for a period of five years, beginning from the day of this contract and ending on the 30th day of August, 1955.

In consideration of the foregoing, the party of the second part hereby agrees to pay to the party of the first part, 50% of the gross receipts of said coin operated bowling machine. Said payments to be paid monthly on or before ten days after the close of each month's business. Said payment is to be accompanied by an accounting of the business for the above specified period. Said accounting is to be approved by the Auditor of said city or his deputy and shall be filed with the Director of Public Service.

The party of the second part shall hold said city free and harmless from any and all damage, or claims from damage, arising out of the operation of said coin operated bowling machine.

The superintendent of The Columbus Airport shall make and enforce such reasonable rules and regulations for the

operation of said bowling machine as he may deem necessary.

It is mutually agreed by and between the parties hereto that if the party of the second part shall fail or neglect to pay any of the installments herein provided for when the same becomes due, or within thirty days thereafter and without demand being made therefor, or if the party of the second part shall fail to keep and perform any of the covenants, conditions or agreements of this contract on his part to be kept and performed, or if said party of the second part shall assign or sublet this contract or any part thereof, without the written consent of the Director of Public Service, or if said party of the second part shall be adjudged a bankrupt, or shall make an assignment for the benefit of creditors, or if any interest of the party of the second part shall be sold under execution or other legal process, it shall be lawful for said party of the first part, at its option, to terminate this contract and thereupon the rights granted herein and hereunder pertaining thereto, shall cease and terminate.

In Witness Whereof, the parties hereto have hereunto set their hands on the day and year above written.

The City of Columbus, Ohio
By: /s/ Elmer A. Keller
Director of Public Service
Party of the First Part
/s/ G. O. Coin Service
429 S. 4th St.
By: /s/ Guy Oddi
Party of the Second Part

Signed in the presence of:
/s/ Wanda Schnell
/s/ Barbara Smith

IN THE SUPREME COURT OF OHIO

RAY M. BENJAMIN, ET AL.,
Plaintiffs-Appellants,
vs.
CITY OF COLUMBUS, ET AL.,
Defendants-Appellees.

[No. 35179]

TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES

1957, April 2. Notice of appeal and proof of service filed.

1957, April 9. Motion to certify record and proof of service filed.

1957, April 9. Court of Appeals transcript of docket and journal entries and original papers and exhibits filed.

1957, April 17. Appellants' printed brief and acknowledgment of service filed.

1957, April 22. Bill of exceptions filed.

1957, May 6. Leave to file memorandum of appellees instanter filed.

1957, May 6. Memorandum of appellees filed.

1957, June 19. Motion for an order directing the Court of Appeals of Franklin county to certify its record, allowed. Journal No. 42, page 346.

1957, June 19. Order No. 3172 issued to clerk of courts to certify record.

1957, June 22. Certificate of Court of Appeals filed.

1957, June 22. Cause docketed on its merits.

1957, June 22. Assignments of error refiled. 6/27/57 Proof of service filed.

1957, June 22. Appellants' printed brief refiled. 6/27/57 Proof of service filed.

1957, June 22. Papers taken by Rodenfels. 7/15/57. Returned.

1957, July 16. Printed record and proof of service filed.

1957, August 15. Printer's receipted bill filed.

1957, August 27. Entry extending time for filing appellees' brief to September 30, 1957. Carl V. Weygandt, Chief Justice. Journal No. 42, page 378.

1957, September 30. Nonprinted brief of appellees and proof of service filed.

1957, October 17. Appellants' printed reply brief and affidavit of service filed.

1957, December 18. Judgment affirmed. Journal No. 42, page 462.

1957, December 23. Notified application for rehearing to be filed.

1957, December 31. Application for rehearing filed.

1958, January 15. Rehearing denied. Journal No. 42, page 481.

1958, January 21. Precipe for preparation of transcript of record filed.

Journal Entries

June 19, 1957. Motion for an order directing the Court of Appeals of Franklin county to certify its record. It is ordered by the court that this motion be, and the same hereby is, allowed.

August 27, 1957. Upon application of appellees and for good cause shown, it is ordered that the time for filing brief of appellee herein be, and the same hereby is, extended to September 30, 1957. Carl V. Weygandt, Chief Justice.

December 18, 1957. This cause came on to be heard upon the transcript of the record of the Court of Appeals of Franklin county and was argued by counsel. On considera-

tion whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

It is further ordered that the appellees recover from the appellants their costs herein expended taxed at $.....

Ordered, that a special mandate be sent to the Court of Appeals of Franklin county, to carry this judgment into execution.

January 15, 1958. Upon consideration of the above application for rehearing, it is ordered by the court that rehearing be, and the same hereby is, denied.

NOTICE OF APPEAL

[Filed April 2, 1957.]

Plaintiffs-appellants hereby give notice of appeal to the Supreme Court of Ohio from a judgment rendered by the Court of Appeals of Franklin county, Ohio, in the above entitled cause on the eighteenth day of March, 1957. Said appeal is on questions of law (a) in a case involving a constitutional question and (b) on condition that a motion to certify be allowed by said Supreme Court.

OWEN B. SHERWOOD,
McLESKEY & McLESKEY,
Attorneys for Plaintiffs-Appellants.

MOTION TO CERTIFY RECORD

[Filed April 9, 1957.]

Now come the plaintiffs-appellants and move the court for an order directing the Court of Appeals of Franklin county, Ohio, to certify the record in the above entitled cause to this court, for the following reasons, to-wit:

1. That said cause, as well as the questions involved therein, is of public and great and general interest.

2. That there is error in said record and judgment prejudicial to the plaintiffs-appellants herein. All of which is fully set forth in the brief in support of this motion filed herewith.

OWEN B. SHERWOOD,
McLESKEY & McLESKEY
Attorneys for Plaintiffs-Appellants.

ASSIGNMENTS OF ERROR

[Filed April 17, 1957.]
[Refiled June 22, 1957.]

1. That the Court of Appeals erred in holding that the plaintiffs did not meet, much less overcome, the legislative declaration by the council of the city of Columbus, Ohio, in Ordinances Nos. 156-53, 157-53 and 1615-54 that said pin games tend to encourage gambling and loitering.

2. That the Court of Appeals erred in holding that the plaintiffs failed to show that the council of the city of Columbus, Ohio, was wrong in declaring a pin game readily convertible into a gambling device.

3. That the Court of Appeals erred in holding that the plaintiffs failed to show that said Ordinances Nos. 156-53, 157-53 and 1615-54 are arbitrary.

4. That the Court of Appeals erred in holding that the plaintiffs failed to show that said Ordinances Nos. 156-53, 157-53 and 1615-54 are unreasonable.

5. That the Court of Appeals erred in holding that the plaintiffs failed to show that said Ordinances Nos. 156-53, 157-53 and 1615-54 have no reasonable relation to the public health, morals, safety or welfare of the community.

6. That the Court of Appeals erred in holding that the plaintiffs failed to show a clear incompatibility between Ordinances Nos. 156-53, 157-53 and 1615-54 and the Constitution of Ohio.

7. That the Court of Appeals erred in holding that the plaintiffs failed to show that in enacting said Ordinances Nos. 156-53, 157-53 and 1615-54, said council of the city of Columbus, Ohio (a) exceeded its power, (b) acted in bad faith, or (c) abused its discretion.

8. That the Court of Appeals erred in holding that the power to "regulate" includes the power to "prohibit".

9. That the Court of Appeals erred in holding that the power of a municipality to regulate as provided in Section 3, Article XVIII of the Constitution of Ohio, includes the power to prohibit.

10. That the Court of Appeals erred in holding that there is a distinction between the principle which prohibits the operation of pin games and the principle applied in the so-called "fish net" cases.

11. That the Court of Appeals erred in holding that Ordinances Nos. 156-53, 157-53 and 1615-54 bear a real and substantial relation to the public health, safety, morals or general welfare of the public.

12. That the Court of Appeals erred in holding that in the enactment of said Ordinances Nos. Nos. 156-53, 157-53 and 1615-54 said council of the city of Columbus did not exercise its powers (a) in an arbitrary or unreasonable manner, or (b) in violation of constitutional guaranties.

13. That the Court of Appeals erred in holding that a municipality may prohibit that which is declared by its legislative body to have evil potentialities.

14. That the Court of Appeals erred in holding that the council of the city of Columbus, Ohio, may by ordinance prohibit the ownership, possession, custody or control of pin games within the limits of said city.

15. That the Court of Appeals erred in holding that Ordinances Nos. 156-53 and 157-53 do not constitute an unlawful delegation of judicial power.

16. That the Court of Appeals erred in holding that any unlawful delegation of judicial power contained in Ordinances Nos. 156-53 and 157-53 was removed by the enactment of Ordinance No. 1615-54.

17. That the Court of Appeals erred in holding that Ordinance No. 156-53 is not in contravention of the state or federal constitutions.

18. That the Court of Appeals erred in holding that Ordinance No. 157-53 is not in contravention of the state or federal constitutions.

19. That the Court of Appeals erred in holding that Ordinance No. 1615-54 is not in contravention of the state or federal constitutions.

20. That the Court of Appeals erred in holding that the plaintiffs are not entitled to a permanent injunction in each of said cases.

21. That the Court of Appeals erred in dissolving the temporary restraining order heretofore issued in each of said cases.

22. That the Court of Appeals erred in dismissing each of said cases.

23. That the judgment in each of said cases should have been in favor of the plaintiffs instead of the city.

24. Other errors of law apparent upon the face of the record, to which the plaintiffs then and there duly excepted.

APPLICATION FOR REHEARING

[Filed December 31, 1957.]

Now come the plaintiffs-appellants and apply for a rehearing of each of the above styled causes for the following reasons, to-wit:

I

As we view the matter, the construction placed upon Section 3 of Article XVIII of the Constitution (Syl. 2 and

3) by this court does not justify a conclusion different from that reached by the Court of Appeals in Frecker v. City of Dayton, 88 O. App., 52. Instead of the two limitations suggested by the court, namely, "within their limits" and "not in conflict with general laws", the word "regulations" would seem to constitute a third limitation. If this is correct then we are still faced with the question as to whether or not the word "regulations" includes the word "prohibitions". In our reply brief (p. 3) we quoted certain language from the majority opinion in the Frecker case (153 O. St., 14) which seems to us to indicate that the majority of the court recognized the distinction between regulation and prohibition. We agree that the dissenting opinion "expressly rejected" the distinction. It seems to us, therefore, that the most that can be said is that the majority of the court was silent as to the distinction while the minority expressly disapproved it.

While Bronson v. Oberlin, 41 O. St., 476, may have been decided before the adoption of Section 3 of Article XVIII of the Constitution, that does not change the fact that in that case the court clearly recognized the distinction between regulation and prohibition.

We do not follow the court in its statement that Weber v. Board of Health, 148 O. St., 389, "actually tends to support the conclusion that legislative power may include the power to prohibit a business not unlawful in itself." It seems to us that the language quoted from paragraph 3 of the syllabus merely characterizes the *type* of function involved, i.e. whether legislative, executive or judicial, and not the *limitations* upon that function. In fact, in Wolars v. Cuyahoga Heights, 53 O. App., 161, 164-5 (Plaintiff's brief, p. 20), the court expressed the opinion that the legislature of the state has no power to declare an absolute

prohibition where the business involved is not a nuisance per se.

II

Despite the language quoted from the second paragraph of the opinion the court apparently construes Myers v. City of Cincinnati, 128 O. St., 235, as involving an amusement device of the same class as those involved in this controversy. We have always construed that case as involving "free-plays". This conclusion is based, among other things, upon the fact that on page 236 of the report it is stated that "the machine *may* automatically release *two or more* circular tokens of the same size as a 5*c* piece * * *. These tokens may be used for the purpose of replaying the machine * * *. Continued playing of the machine *may* bring the reward of *additional metal tokens*, when the mechanism operates in a certain way." (Emphasis ours) As we read the report there was no certainty that any tokens at all would be released by the machine. If, however, we assume from the report that the machine always released two tokens, the chance that it might release "more" or "additional" tokens involved just as much an element of chance as its release of any tokens at all. If, therefore, as we have always contended, that case involved free-plays then we submit that it is not in point.

III

On page 117 of the opinion the court states:

> "It is true that people do gamble with checkers and cards and gamble on the outcome of games such as golf, tennis, football and baseball. However, it would seem that there is a real and substantial distinction between pin games of the kind described in the 1954 ordinance and those other games, which would justify the classification of such pin games separately from those other games."

It seems to us that instead of merely suggesting that there is "a real and substantial distinction" the court should have gone further and indicated exactly what that distinction is.

IV

If, as indicated in City of Xenia v. Schmidt, 101 O. St., 437 (Syl. 9), the legislative body is not required to cover "the whole field of possible abuse", what shall be said about Ordinances No. 156-53 and No. 157-53 wherein the entire field is covered in general terms when the city only proposes to enforce such general provisions against pin games. (R. 62 et seq., 119 et seq.) It seems to us that this type of enforcement under this general type of an ordinance is a plain denial of the equal protection of the law, within the meaning of the Fourteenth Amendment to the Constitution of the United States. In Dobbins v. Los Angeles, 195 U. S., 223, paragraph 3 of the syllabus reads:

> "Although an ordinance may be lawful on its face and apparently fair in its terms, yet if it is enforced in such a manner as to work a discrimination against a part of a community for no lawful reason, such exercise of power will be invalidated by the courts."

V

It is conceded that there are no statutes or constitutional provisions prohibiting the operation of these games as amusement devices. So far as statutes and constitutional provisions are concerned, therefore, their operation is permissible. To say, however, that these ordinances merely go further than the statutes (City of Columbus v. Barr, 160 O. St., 209), is not a final answer to this question. Section 715.51, Revised Code, only authorizes a municipal corporation to destroy "instruments or devices used for the purpose of gambling." If, therefore, as is conceded in this case, these games have not been used for gambling

then it would seem that this statute expressly prohibits their destruction and that, therefore, these ordinances are in conflict therewith.

VI

The court did not discuss the contention of the plaintiffs that Section 3 of Ordinance No. 156-53 attempts to delegate judicial power within the meaning of Article III, Section 1 of the Constitution of the United States. (Plaintiffs' brief, pp. 43-46) The court likewise did not discuss the contentions of the plaintiff that Sections 1, 2, and 3 of Ordinance No. 156-53, and Sections 1 and 3 of Ordinance No. 157-53 are so vague, indefinite and uncertain as to constitute a denial of due process within the meaning of the Fourteenth Amendment to the Constitution of the United States. (Plaintiffs' brief, pp. 35-37) On page 107 of the opinion reference is made to the latter contention but no discussion thereof is contained in the opinion. It is true that in the last paragraph of the opinion reference is made "to the validity and interpretation of other provisions" with the suggestion that a discussion of such provisions might be considered as dicta. However, we fail to see why a discussion of either one or both of these contentions should be so construed. If consideration were given to them it might well be that the court, while upholding the validity of the remainder of these two ordinances, would find that these specific provisions fail to meet the test of constitutionality.

VII

On page 114 of the opinion, the court refers to evidence offered by the plaintiffs in support of their contention that these games "do not tend to encourage gambling or loitering." The court then quotes Murphy v. People (225 U. S., 623) to the effect that judicial notice may be taken that these games have such potentialities. Judicial notice, how-

ever, merely relieves the party who ordinarily would be required to prove a given fact from the necessity of so doing. We do not understand, however, that that rule either precludes or prohibits the adverse party from introducing evidence to the contrary. Morrow v. City of Cleveland, 73 O. App., 460, 463-4; Ohio Bell Telephone v. Public Utilities Commission of Ohio, 301 U. S. (L. Ed.), 292, 301-2. It would seem, therefore, that the evidence offered by the plaintiffs on these points should have been considered by the court, and that its failure to do so amounted to a denial of due process within the meaning of the Fourteenth Amendment to the Constitution of the United States.

VIII

Finally, it seems to us that the effect of the court's decision (Syl. 9) is to leave the property and business of the plaintiffs to the arbitrary whim or caprice of the legislative body of a municipality. If, as here, by a mere declaration that a certain game has evil potentialities (when the facts may be otherwise as we claim the evidence shows in this case), such legislative body can prohibit the ownership, possession or operation of such game within the limits of the municipality, then indeed property has been taken without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

OWEN B. SHERWOOD,

McLESKEY & McLESKEY,

Attorneys for Plaintiffs-Appellants.

IN THE SUPREME COURT OF OHIO

G. D. Ferguson, et al.,
Plaintiffs-Appellants,
vs.
City of Columbus, et al.,
Defendants-Appellees.

[No. 35180]

TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES

1957, April 2. Notice of appeal and proof of service filed.

1957, April 9. Motion to certify record and proof of service filed.

1957, April 9. Court of Appeals transcript of docket and journal entries, original papers and exhibits filed.

1957, April 17. Appellants' printed brief and affidavit of service filed. 4/20/57. Proof of service filed.

1957, April 22. Bill of exceptions filed.

1957, May 6. Leave to file memorandum of appellees instanter filed.

1957, May 6. Memorandum of appellees filed.

1957, May 23. Leave to file appellees' brief instanter filed.

1957, May 23. Appellees' brief opposing motion and proof of service filed.

1957, June 19. Motion for an order directing the Court of Appeals of Franklin county to certify its record; allowed. Journal No. 42, page 346.

1957, June 19. Order No. 3173 issued to clerk of courts to certify record.

1957, June 22. Certificate of Court of Appeals filed.

1957, June 22. Cause docketed on its merits.

1957, June 22. Assignments of error refiled. 6/27/57. Proof of service filed.

1957, June 22. Appellants' printed brief refiled. 6/27/57. Proof of service filed.

1957, June 22. Papers taken by Rodenfels. 7/15/57. Returned.

1957, July 16. Printed record and proof of service filed.

1957, August 27. Entry extending time for filing appellees' brief to September 30, 1957. Carl V. Weygandt, Chief Justice. Journal No. 42, page 378.

1957, September 30. Nonprinted brief of appellees and proof of service filed.

1957, October 17. Appellants' printed reply brief and affidavit of service filed.

1957, December 18. Judgment affirmed. Journal No. 42, page 462.

1957, December 23. Notified application for rehearing to be filed.

1958, January 15. Rehearing denied. Journal No. 42, page 481.

1958, January 21. Precipe for preparation of transcript of record filed.

Journal Entries

June 19, 1957. Motion for an order directing the Court of Appeals of Franklin county to certify its record. It is ordered by the court that this motion be, and the same hereby is, allowed.

August 27, 1957. Upon application of appellees and for good cause shown, it is ordered that the time for filing brief

of appellees herein be, and the same hereby is, extended to September 30, 1957. Carl V. Weygandt, Chief Justice.

December 18, 1957. This cause came on to be heard upon the transcript of the record of the Court of Appeals of Franklin county, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

It is further ordered that the appellees recover from the appellants their costs herein expended taxed at $.....

Ordered, that a special mandate be sent to the Court of Appeals of Franklin county, to carry this judgment into execution.

January 15, 1958. Upon consideration of the above application for rehearing, it is ordered by the court that rehearing be, and the same hereby is, denied.

NOTICE OF APPEAL

[Filed April 2, 1957.]

Plaintiffs-appellants hereby give notice of appeal to the Supreme Court of Ohio from a judgment rendered by the Court of Appeals of Franklin county, Ohio, in the above entitled cause on the eighteenth day of March, 1957. Said appeal is on questions of law (a) in a case involving a constitutional question and (b) on condition that a motion to certify be allowed by said Supreme Court.

OWEN B. SHERWOOD,
McLESKEY & McLESKEY,
Attorneys for Plaintiffs-Appellants.

MOTION TO CERTIFY RECORD

[Filed April 9, 1957.]

Now come the plaintiffs-appellants and move the court for an order directing the Court of Appeals of Franklin county, Ohio, to certify the record in the above entitled cause to this court, for the following reasons, to-wit:

1. That said cause, as well as the questions involved therein, is of public and great and general interest.

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ASSIGNMENTS OF ERROR

[Filed April 17, 1957.]
[Refiled June 22, 1957.]

1. That the Court of Appeals erred in holding that the plaintiffs did not meet, much less overcome, the legislative declaration by the council of the city of Columbus, Ohio, in Ordinances Nos. 156-53, 157-53 and 1615-54 that said pin games tend to encourage gambling and loitering.

2. That the Court of Appeals erred in holding that the plaintiffs failed to show that the council of the city of Columbus, Ohio, was wrong in declaring a pin game readily convertible into a gambling device.

3. That the Court of Appeals erred in holding that the plaintiffs failed to show that said Ordinances Nos. 156-53, 157-53 and 1615-54 are arbitrary.

4. That the Court of Appeals erred in holding that the plaintiffs failed to show that said Ordinances Nos. 156-53, 157-53 and 1615-54 are unreasonable.

5. That the Court of Appeals erred in holding that the plaintiffs failed to show that said Ordinances Nos. 156-53, 157-53 and 1615-54 have no reasonable relation to the public health, morals, safety or welfare of the community.

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APPLICATION FOR REHEARING

[Filed December 31, 1957.]

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It is conceded that there are no statutes or constitutional provisions prohibiting the operation of these games as amusement devices. So far as statutes and constitutional provisions are concerned, therefore, their operation is permissible. To say, however, that these ordinances merely go further than the statutes (City of Columbus v. Barr, 160 O. St., 209), is not a final answer to this question. Section 715.51, Revised Code, only authorizes a municipal corporation to destroy "instruments or devices used for the purpose of gambling." If, therefore, as is conceded in this case, these games have not been used for gambling then it would seem that this statute expressly prohibits their destruction and that, therefore, these ordinances are in conflict therewith.

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(Plaintiffs' brief, pp. 35-37) On page 107 of the opinion reference is made to the latter contention but no discussion thereof is contained in the opinion. It is true that in the last paragraph of the opinion reference is made "to the validity and interpretation of other provisions" with the suggestion that a discussion of such provisions might be considered as dicta. However, we fail to see why a discussion of either one or both of these contentions should be so construed. If consideration were given to them it might well be that the court, while upholding the validity of the remainder of these two ordinances, would find that these specific provisions fail to meet the test of constitutionality.

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Finally, it seems to us that the effect of the court's decision (Syl. 9) is to leave the property and business of the plaintiffs to the arbitrary whim or caprice of the legislative body of a municipality. If, as here, by a mere declaration that a certain game has evil potentialities (when the facts may be otherwise as we claim the evidence shows in this case), such legislative body can prohibit the ownership, possession or operation of such game within the limits of the municipality, then indeed property has been taken without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

OWEN B. SHERWOOD,

McLESKEY & McLESKEY,

Attorneys for Plaintiffs-Appellants.

OPINION OF THE SUPREME COURT OF OHIO

No. 35179—Ray M. Benjamin, et al., v. City of Columbus, et al.

No. 35180—G. D. Ferguson, et al., v. City of Columbus, et al.

Decided December 18, 1957

1. Where all the proposed uses of certain pin-game machines by their owners will necessarily violate the law as set forth in valid municipal ordinances, the petitions of such owners seeking equitable relief to protect those machines and seeking declaratory judgments setting forth their rights and duties with respect to them will be dismissed. (Paragraph four of the syllabus of Westerhaus v.

City of Cincinnati, 165 Ohio St., 327, approved and followed.)

2. The "powers of local self-government" conferred upon municipalities by Section 3 of Article XVIII of the Constitution include the power to enact local legislation, except to the extent that limitations upon that legislative power have been set forth in the Constitution.

3. The words appearing in Section 3 of Article XVIII of the Constitution after the word "self-government" represent not a grant of legislative power but a limitation upon the legislative power granted by the words up to and including the word "self-government."

4. A municipal ordinance enacted pursuant to the police power of the municipality cannot be considered invalid merely because it prohibits instead of regulates. (Frecker v. City of Dayton, 153 Ohio St., 14, distinguished.)

5. Although almost every exercise of the police power will necessarily either interfere with the enjoyment of liberty or the acquisition, possession and production of property, within the meaning of Section 1 of Article I of the Ohio Constitution, or involve an injury to a person within the meaning of Section 16 of Article I of that Constitution, or deprive a person of property within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States, an exercise of the police power having such an effect will be valid if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary.

6. Whether an exercise of the police power does bear a real and substantial relation to the public health, safety, morals or general welfare of the public and whether it is

unreasonable or arbitrary are questions which are committed in the first instance to the judgment and discretion of the legislative body, and, unless the decisions of such legislative body on those questions appear to be clearly erroneous, the courts will not invalidate them.

7. Where an amusement device is so designed that it may readily be put to an unlawful use in gambling, a municipality may, in the exercise of its police power, prohibit the exhibition of such machine and need not postpone such action until such machine is unlawfully used. (Myers v. City of Cincinnati, 128 Ohio St., 235, followed.)

8. A machine or other device is not a game within the ordinary meaning of the word "game" if it does not enable someone to determine whether he has, by his efforts in playing it, either made some score or achieved or not achieved some other objective.

9. A municipality may by ordinance make it a misdemeanor to possess within the municipality any pin game, the operation, use or play of which is controlled by placing therein any coin, although operation of such machine will not give a player any prize even by way of free plays or anything in return for his payment other than amusement in playing such game.

10. The provisions of the state and federal Constitutions, inhibiting laws impairing the obligation of contract, cannot affect the police power.

11. If the police power of a municipality includes the power to make possession within the municipality of a certain kind of property unlawful, the exercise of that police power to make such possession unlawful will not be impaired by the fact that owners of such property have theretofore made binding contracts relative to its use within the municipality.

These two actions for declaratory judgment and injunction were heard together by the Common Pleas Court of Franklin County under a stipulation that any evidence competent in one case should be competent in the other, and that the validity of three ordinances of the city of Columbus should be treated as being involved in each case. The plaintiffs in both cases, herein referred to as plaintiffs, have for varying numbers of years owned and operated in Columbus varying numbers of pin-game machines having very substantial values.

The three ordinances, the validity of which are questioned and which are now incorporated in the Code of the City of Columbus, are ordinance No. 156-53, relative to licensing of mechanical amusement devices but containing some provisions relative to seizure of machines tending to encourage gambling, ordinance No. 157-53, relative to gambling but containing some provisions declaring as a nuisance the exhibition for the purpose of operation of machines merely tending to encourage gambling and authorizing their seizure, and ordinance No. 1615-54 which reads so far as pertinent:

"Section 29.69-1. * * * Whoever shall within the city have in his possession, or in his custody or under his control any table game or device commonly known as a 'pin game,' 'pin-ball game,' or 'marble game,' the operation, use or play of which is controlled by placing therein any coin, plate, disk, plug, key or other token, or by the payment of a fee, shall be guilty of a misdemeanor * * *."

In the preamble to the ordinance enacting that section of the Code of the City of Columbus, it is stated in part:

"Whereas, the operation of pin-ball machines and similar machines involving chance or skill or reward encourages

gaming and the general disorder incident thereto, and is a threat or menace to the peace and morals of the community; and,

"Whereas, even the so-called amusement-only pin-ball machines are so constructed as to be almost identical in appearance and operation to certain gambling devices, per se; and

"Whereas, even the vast majority of such so-called amusement-only devices are readily convertible to gambling devices; and,

"Whereas, the operation of even amusement-only pin-ball machines has become and now constitutes a nuisance in that it encourages a false sens of values, idling, and loitering * * *".

This latter ordinance was enacted in December 1954, immediately after the Court of Appeals in Ferguson v. City of Columbus, 70 Ohio Law Abs., 277, 128 N. E. (2d), 198, had cast doubt upon the effectiveness of the two earlier ordinances in discouraging the ownership or exhibition of machines which, although not gambling devices per se or shown to have been used for gambling, were adapted for gambling, might readily be converted to be so adapted, or registered odds or a score.

The Common Pleas Court determined that all these ordinances are "invalid, unconstitutional and void, insofar as they prohibit the ownership, possession, custody, control and operation of pin games for amusement purposes only" and decreed that defendants should be enjoined from interfering under these ordinances "with the ownership, possession, custody, control and operation of said pin games by * * * plaintiffs * * * as well as interfering with or molesting any merchant with whom said plaintiffs

have either heretofore had, or may now or hereafter have, contracts for the operation of said games, so long as said games are not used for gambling." Benjamin v. City of Columbus, 73 Ohio Law Abs., 143, 136 N. E. (2d), 641.

On appeal to the Court of Appeals on questions of law and fact, that court determined that the three ordinances are valid and that plaintiffs are "not entitled to an injunction restraining the enforcement of said ordinances" and dismissed the petitions.

These two causes are now before this court on appeal from the judgments of the Court of Appeals, both as appeals involving constitutional questions and pursuant to allowances of motions to certify the records.

Opinion

Taft, Judge:

In order to avoid the effect of this court's decision in Westerhaus v. City of Cincinnati, 165 Ohio St., 327, 135 N. E. (2d), 318, plaintiffs have emphasized the fact that the machines involved in the instant case are not equipped so as to provide for and are not to be used to provide free plays. However, besides deciding that free-play machines are gambling devices, we also decided in the Westerhaus case that, since the proposed use of the machines there involved would violate certain state statutes, a petition of the owner of the machines "seeking equitable relief to protect such machines and seeking a declaratory judgment setting forth the rights and duties of such owner with respect to such machines, will be dismissed." (Paragraph four of syllabus.) In the opinion at page 335, it was pointed out that "if * * * each of the * * * machines * * * is * * * a 'gambling device or machine,' then the" trial

court "would have been encouraging violations of" the law "if it had given plaintiff any relief with regard to those machines, and its judgment in dismissing the petition must be affirmed." If all the proposed uses by plaintiffs of the machines involved in the instant cases will necessarily violate the law, then their petitions, seeking equitable relief to protect those machines and seeking declaratory judgments setting forth their rights and duties with respect to such machines, should be dismissed. Even though the law violated may be set forth in municipal ordinances instead of in state statutes, the same principle must be applied.

As we view it therefore we are confronted at the outset with the question whether the proposed uses by plaintiffs of the machines involved in the instant cases will necessarily violate any valid provisions of the ordinances of Columbus.

We agree with the Court of Appeals that these ordinances appear to have "been hastily drawn and considered without that degree of care and clarity of expression which should attend legislative enactments." However, although complaint is made with respect to the vagueness, indefiniteness and uncertainty of some parts of these three ordinances, no such complaint is made with regard to the provisions of section 29.69-1, hereinafter referred to as the 1954 ordinance, which makes it a *misdemeanor to possess within the city or to control a "pin game* * * * the operation, use or play of which is *controlled by placing therein any coin.*" The allegations of plaintiffs' petitions either are or necessarily indicate that plaintiffs' business is the ownership, exhibition and rental to others for exhibition and use *in Columbus* of just such pin games. It is apparent there-

fore that plaintiffs neither contemplate nor suggest any possession in Columbus by anyone of the machines involved in the instant cases that will not necessarily amount to what is specified as a misdemeanor by that ordinance. Hence, unless plaintiffs can establish the invalidity of that ordinance, their petitions must be dismissed.

Plaintiffs argue that, since the pin-game machines in the instant cases are to be used for amusement only, their operation constitutes a legitimate business; and that such a business cannot be prohibited. Such an argument, in effect, begs th question. Obviously, to the extent that acts in carrying on a business do not violate valid prohibitions of statutes and ordinances, it is a legitimate and lawful business. To the extent that those acts do violate such prohibitions, the business is neither legitimate nor lawful. If the carrying on of that business involves the doing of acts which are prohibited by the 1954 ordinance, then it is necessary to determine whether that ordinance is valid. It is not helpful, in determining that question, to jump to the conclusion that there is a right to do such acts and that, therefore, the ordinance prohibiting the doing of them is invalid.

Plaintiffs argue in effect that, although Columbus may have power to make regulations with respect to pin-game machines, it has no power to prohibit them.

Columbus contends that its power to enact the 1954 ordinance is derived from the provisions of Section 3 of Article XVIII of the Constitution, and plaintiffs contend that any such power can only be derived therefrom. That section reads:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce

within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

The "powers of local self-government" conferred upon municipalities by this constitutional provision include the power to enact local legislation, except to the extent that limitations upon that legislative power have been set forth in the Constitution. Obviously, one such limitation is that any "police, sanitary and other similar regulations" that are adopted may be enforced only "within" the municipality's limits and cannot "conflict with general laws." However, the words appearing in Section 3 of Article XVIII of the Constitution after the word "self-government" represent not a grant of legislative power but a limitation on the legislative power granted by the words up to and including the word "self-government." Hence, if the state would have power to prohibit what the 1954 ordinance purports to prohibit within the limits of Columbus, then that ordinance cannot be considered invalid merely because it prohibits instead of regulates.

We recognize that the Court of Appeals for Montgomery County apparently based its decision in Frecker v. City of Dayton, 88 Ohio App., 52, 85 N. E. (2d), 419, upon the conclusion that the police power granted to municipalities by Section 3 of Article XVIII of the Constitution includes the power to regulate but not the power to prohibit. That conclusion was apparently based upon the premise that the police power of a municipality or its power to enact police regulations is derived from the portion of that constitutional provision appearing after the word "self-government." As hereinbefore pointed out that premise is incorrect. It may be observed that, although this court affirmed

the judgment of the Court of Appeals in the Frecker case (153 Ohio St., 14, 90 N. E. (2d), 851), the majority opinion, in giving reasons for the affirmance, apparently did not approve the conclusion, expressed by the Court of Appeals, that the police power granted to municipalities includes only the power to regulate and not the power to prohibit; and the minority opinion expressly rejected that particular conclusion of the Court of Appeals, thereby at least indicating that this court unanimously failed to approve any such conclusion when it was urged to approve it.

The case of Bronson v. Oberlin, 41 Ohio St., 476, 53 Am. Rep., 90, relied upon by plaintiffs, was decided long before adoption of Section 3 of Article XVIII of the Constitution and at a time when municipalities derived any legislative powers they might have from enactments of the General Assembly. Its distinction from the instant case is well demonstrated by the following language of the opinion by Nash, J., at page 482:

"Whether the Legislature could confer the power to prohibit * * * or whether the council by ordinance could prohibit what this power conferred, are questions not involved in this case. The question simply is, 'What power did this act confer?' We are of the opinion that it did not give authority to prohibit."

The case of Weber v. Board of Health, 148 Ohio St., 389, 74 N. E. (2d), 331, relied upon by plaintiffs, actually tends to support the conclusion that legislative power may include the power to prohibit a business not unlawful in itself. Thus it is said in paragraph three of the syllabus:

"* * * when such board (of health) passes a resolution which prohibits a business not unlawful in itself and which is susceptible to regulations * * * such board

transcends its administrative rule-making power and exercises legislative functions * * *."

Plaintiffs argue that the 1954 ordinance is arbitrary and unreasonable and that it takes plaintiffs' property without due process of law.

Almost every exercise of the police power will necessarily either interfere with the enjoyment of liberty or the acquisition, possession and production of property, within the meaning of Section 1 of Article I of the Ohio Constitution, or involve an injury to a person within the meaning of Section 16 of Article I of that Constitution, or deprive a person of property within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States. Nevertheless, it is well settled that an exercise of the police power having such an effect will be valid if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary. City of Piqua v. Zimmerlin, 35 Ohio St., 507, 511.

Whether an exercise of the police power does bear a real and substantial relation to the public health, safety, morals or general welfare of the public and whether it is unreasonable or arbitrary are questions which are committed in the first instance to the judgment and discretion of the legislative body, and, unless the decisions of such legislative body on those questions appear to be clearly erroneous, the courts will not invalidate them. State, ex rel., Standard Oil Co., v. Combs, Dir., 129 Ohio St., 251, 194 N. E., 875; City of Dayton v. S. S. Kresge Co., 114 Ohio St., 625, 151 N. E., 775, 53 A. L. R., 916; and City of Cleveland v. Terrill, 149 Ohio St., 532, 80 N. E. (2d), 115.

Myers v. City of Cincinnati, 128 Ohio St., 235, 190 N. E., 569, involved an ordinance which made it unlawful "to exhibit * * * any machine * * * which may be operated by the use of any coin, token * * * or disc * * * if said machine * * * when so operated * * * returns or distributes one or more coins, tokens * * * or discs." A machine which always returns one or always returns any other specific number of tokens would be described by the words of this ordinance. Such a machine obviously does not involve any element of chance, an essential element of gambling. Also, except for a possible inference which might be drawn from the portion of the opinion first quoted hereinafter, there is nothing in the report of the case to indicate that any element of chance was involved in playing this machine, i.e., a chance of getting *or not getting* tokens that would enable a replay.

In the opinion "by the court" it is said:

"Many recent decisions are to the effect that slot vending machines of the general type involved in this case, which in return for coins deposited therein dispense merchandise, accompanied at intervals by a varying number of checks or tokens which may be used either for obtaining additional merchandise or for securing additional amusement by continuing the operation of the machine, are gambling devices."

The report affirmatively indicates that the tokens received from this machine had no cash or trade value and that one who put a nickel in the machine always got a package of mints but that nothing but tokens came from the machine when replayed only with a token. Although tokens could be used "for securing additional amusement by continuing the operation of the machine," it does not appear whether the machine dispensed "at intervals * * *

a varying number of tokens" or whether it simply dispensed on each occasion the same number of tokens. If the machine simply dispensed on each occasion the same number of tokens, then it would obviously not involve the element of chance, an essential element of gambling. See Westerhaus v. City of Cincinnati, supra (165 Ohio St., 327). That this may have been the fact is indicated by the remainder of the opinion reading, so far as pertinent:

"* * * our sole function is to decide whether the ordinance before us constitutes a valid exercise of police power on the part of the municipal authorities * * *.

"The constitutional provisions relied upon by plaintiff in error protect the citizen in his right to pursue any lawful business, but they do not prohibit legislation intended to control pursuits which because of their nature have injurious and harmful possibilities. Even if the slot machine involved in this case is manufactured and intended for lawful operation, its potentiality and design is such that it may be easily put to unlawful use. (As by wagering on which or what combination of designs would appear on the stopping of each of the three wheels rotated in the playing of the machine.) The regulation or prohibition of such a mechanism need not be postponed until such event occurs * * *.

"* * *

"The city has the right to determine whether the exhibition, maintenance and operation of slot machines as defined in the ordinance are prejudicial to the public good * * *.

"Being of the opinion that the ordinance in question constitutes a valid exercise of police power and that the defendant was properly convicted under it, the judgment * * * is affirmed."

It is apparent that this court assumed in that case that the slot machine there involved was "manufactured and intended for lawful operation." However, this court unanimously held that a municipality might prohibit its exhibition because "its potentiality and design" were "such that it may be easily put to unlawful use"; and this court unanimously and specifically stated that "the * * * prohibition of such a mechanism need not be postponed until such event occurs." See also Zelles v. Matowitz, 139 Ohio St., 627, 41 N. E. (2d), 708 (trial court report in 22 Ohio Opinions, 261).

Such a conclusion is in full accord with decisions outside this state. Calcutt v. McGeachy, Sheriff (1937), 213 N. C., 1, 195 S. E., 49; Stanley v. State (1937), 194 Ark., 483, 107 S. W. (2d), 532; Woodward v. City of Lithonia (1940), 191 Ga., 234, 11 S. E. (2d), 476; Alexander v. Hunnicutt, Sheriff (1941), 196 S. C., 364, 13 S. E. (2d), 630; State, ex rel., Green, v. One 5¢ Fifth Inning Baseball Machine (1941), 241 Ala., 445, 3 So. (2d), 27. See Eccles v. Stone, Sheriff (1938), 134 Fla., 113, 183 So., 628; Murphy v. People, 225 U. S., 621, 56 L. Ed., 1229, 32 S. Ct., 697, 41 L. R. A. (N. S.), 153; Ohio, ex rel., Clark, v. Deckebach, Aud., 274 U. S., 392, 71 L. Ed., 1115, 47 S. Ct., 630; 52 American Jurisprudence, 280, Section 34; 24 American Jurisprudence, 421, Section 34. Annotation, 148 A. L. R., 879, 895. But see also annotations, 132 A. L. R., 1004, 162 A. L. R., 1118.

If the reasoning of the court given in Stanley v. State, supra, as a basis for its decision were followed, we would be required to say in the instant cases that the machines described in the 1954 ordinance are "gambling devices per se because the only reasonable and profitable use to which they may be put is use in a game of chance." This is be-

cause a reading of the report of that case will readily lead to the conclusion that the machine there involved was much more of an amusement device than the machines described in the 1954 Columbus ordinance.

Although the allegations of plaintiffs' petitions disclose that their machines all register scores, it is conceivable that a pin game might be so designed as to register no score. However, it would not be a game within the ordinary meaning of the word "game", and hence would not be described by the words of the 1954 ordinance, if it did not enable someone to determine whether he had, by his efforts in playing it, either achieved or not achieved some objective. Hence, the pin game described in this ordinance will require payment of a price ("play * * * controlled by placing therein * * * coin") for the chance of achieving a score or some other objective. Even though no provision is made for the third essential element of gambling, i.e., a prize on achieving such score or other objective, it is apparent that the machine does furnish a ready means for two or more persons to gamble, by providing for such a prize on the achievement of some score or other objective of the game, and hence the game is readily adaptable to use for gambling purposes.

In determining whether the 1954 ordinance is reasonable and whether it has a substantial relationship to the health, morals, safety or general welfare of the people of Columbus, we must weigh the benefits to those people from the elimination of such devices against the benefits in having such devices available for use by those people and the interests of the plaintiffs as the owners of those devices. Cf. Curtiss v. City of Cleveland, 166 Ohio St., 509.

In doing so, we note at the outset that the ordinance does not purport to and could not make possession of the machines unlawful outside Columbus. Thus, plaintiffs can only be prevented from having them in Columbus. This may involve plaintiffs in some expense in moving the machines from Columbus and may prevent them from making money from their use in Columbus, but, if plaintiffs comply with the ordinance, they do not lose their machines and will have opportunities to make money from their use elsewhere.

It is true that these machines may be operated by members of the public without any gambling, but there will obviously be very little if any benefit from such operation to anyone, other than to the owner or exhibitor by reason of payments received for their use. Certainly, a legislative body could reasonably conclude that the amusement provided to operators of such machines, which is all they would get from their operation unless they were used as gambling devices, would contribute little if anything at all to the health, safety, morals or welfare of such operators or of the people of Columbus.

On the other hand, the potentialities for injury and harm to the health, morals, safety and welfare of the public from these machines may quite reasonably have been, as the preamble to the 1954 ordinance indicates they were, regarded as very serious by the legislative body of Columbus.

In support of their contention that there are no such potentialities for such injury or harm, plaintiffs offered considerable evidence in an effort to establish that the games described by the 1954 ordinance do not tend to encourage gambling or loitering. With respect to a somewhat similar problem it was said in the opinion by Mr. Justice Lamar in Murphy v. People, supra (225 U. S., 623):

"That the keeping of a billiard hall has a harmful tendency is a fact requiring no proof, and incapable of being controverted by the testimony of the plaintiff that his business was lawfully conducted, free from gaming or anything that could affect the morality of the community or of his patrons. The fact that there had been no disorder or open violation of the law does not prevent the municipal authorities from taking legislative notice of the idleness or other evils which result from the maintenance of a resort where it is the business of one to stimulate others to play beyond what is proper for legitimate recreation."

Where it has clearly appeared that legislation enacted pursuant to the police power is unreasonable or arbitrary or has no real or substantial relation to the public health, safety, morals, or general welfare, this court has not hesitated to hold it invalid. See Olds v. Klotz, 131 Ohio St., 447, 3 N. E. (2d), 371 (holding invalid ordinance limiting and fixing hours per day during which grocery might be kept open); City of Cincinnati v. Correll, 141 Ohio St., 535, 49 N.E. (2d), 412 (holding invalid ordinance limiting and fixing hours during which barber shop may remain open); Grieb v. Department of Liquor Control, 153 Ohio St., 77, 90 N. E. (2d), 691 (holding invalid statutes providing for confiscation of alcoholic liquors lawfully acquired and owned by but found on premises of one whose permit to sell had been revoked or cancelled). However, as to the 1954 ordinance involved in the instant case, it does not so appear.

In contending that the 1954 ordinance is arbitrary and unreasonable, plaintiffs further point out that its words would preclude the possession of a pin-game machine in a private home, solely for the amusement of the owner, his

family and friends; and it is contended that a municipal legislative body has no authority to enact any such prohibitory legislation.

As the preamble to the 1954 ordinance indicates, possession of the pin games described therein was made unlawful because the legislative body had, among other things, determined that their "operation * * * encourages gaming and the general disorder incidental thereto * * * and * * * encourages a false sense of values, idling and loitering." It is obvious that the operation of a machine in a private home would encourage the same things. Thus, Section 2915.06, Revised Code, makes it a crime for any "person" to "play a game for money or other thing of value or make a wager" therefor; and a pin game such as described in the 1954 ordinance could obviously be very readily used in a private home as a means of violating that statute.

Also, if the owner of a private home really wants to keep such a machine in his home solely for the amusement of himself, his family and friends, he can do so without violating the 1954 ordinance by acquiring such a machine so modified that its operation is not, to use the words of the ordinance, "controlled by placing therein any coin, plate, disk, plug, key or other token, or by the payment of a fee." It could hardly be contended with reason that the amusement to the operator, which plaintiffs claim is harmless, is such "placing therein" or "payment".

If the 1954 ordinance made an exception for possession of these machines in private homes, such exception would obviously furnish a means of covering up illegal possessions of such machines. Also such machines could then rapidly

be moved to and from such homes in order to keep them away from the activity of law-enforcement officers.

In our opinion, the breadth of this prohibition of possession of these machines, as specified in the 1954 ordinance, has a reasonable basis and could reasonably have been determined by the Columbus legislative body to have a real and substantial relationship to the health, morals, safety and welfare of the people of Columbus.

It may further be observed with respect to this contention that, in making it, plaintiffs are seeking a decision that the 1954 ordinance is invalid, not because it impairs any constitutional rights of plaintiffs but because it impairs the constitutional rights of others. It has sometimes been said that "one attacking the constitutionality of a statute is not the champion of any rights except his own." 11 American Jurisprudence, 752, Section 111.

Plaintiffs contend, in effect, that, since they have many outstanding contracts with others for the operation of these pin games in Columbus, an ordinace making it a misdemeanor to possess or control such games within Columbus will be invalid because it will impair the obligation of those contracts within the meaning of constitutional provisions.

It is well settled that the provisions of the state and federal Constitutions, inhibiting laws impairing the obligation of contract, cannot affect the police power. In other words, the exercise of the police power cannot be headed off by the making of contracts reaching into the future. State, ex rel. Crabbe, Atty. Genl., v. Massillon Savings & Loan Co., 110 Ohio St., 320, 143 N. E., 894; City of Akron v. Public Utilities Commission, 149 Ohio St., 347, 78 N. E. (2d), 890. Thus, if the police power of a municipality

includes the power to make possession within the municipality of a certain kind of property unlawful, the exercise of that police power to make such possession unlawful will not be impaired by the fact that owners of such property have theretofore made otherwise binding contracts relative to its use within the municipality.

Plaintiffs contend in effect that, if possession of the games described in the 1954 ordinance is to be made unlawful because of the possibility that they might be used for gambling, then all games having a similar possibility should likewise be treated as unlawful; and that otherwise there will be a clear denial of the equal protection of the law within the meaning of constitutional provisions.

It is true that people do gamble with checkers and cards and gamble on the outcome of games such as golf, tennis, football and baseball. However, it would seem that there is a real and substantial distinction between pin games of the kind described in the 1954 ordinance and those other games, which would justify the classification of such pin games separately from those other games.

We believe that this contention of plaintiffs is disposed of by the following statements from the syllabus in City of Xenia v. Schmidt, 101 Ohio St., 437, 130 N. E., 24:

"5. A classification must not be arbitrary, artificial, or evasive, but there must be a real and substantial distinction in the nature of the class or classes upon which the law operates.

"6. In respect to such distinctions, the legislative body has a wide discretion, and the legislation involving classification will not therefore be held invalid unless the classification attempted is clearly and obviously unreasonable to

the point of discriminating against members of the same class, so as to deny them the equal protection of the laws. * * *

"8. The guarantee of 'equal protection of the laws' under our Constitutions is fully complied with when the law operates equally upon each member of a constitutional class.

"9. A legislative body may direct its legislation against any evil as it actually exists, without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are not forbidden. (Yee Bow v. City of Cleveland et al., 99 Ohio St., 269, approved and followed.)"

Plaintiffs contend that the 1954 ordinance forbids what the statutes permit and therefore represents a regulation which is "in conflict with general laws" within the meaning of Section 3 of Article XVIII of the Constitution.

In support of this contention, it is pointed out that there is no statute or constitutional provision which forbids the operation of an amusement device of the kind described in the 1954 ordinance. Apparently, to the extent that they fail to prohibit the possession or control of machines such as described in the 1954 ordinance, the statutes of Ohio may be said to permit such possession or control. However, there is no statute or constitutional provision which authorizes the possession or control of such machines.

In disposing of a similar contention with respect to a Columbus ordinance which made it a crime to have "possession * * * custody, or * * * control" of "any ticket, check * * * slip * * * or document * * * used * * * as evidence * * * in * * * recording * * * an interest in a lottery," it was said in the opinion

by Middleton, J., in City of Columbus v. Barr, 160 Ohio St., 209, 212, 115 N. E. (2d), 391:

"The ordinance merely goes further than the statute in prescribing a penalty for engaging in gambling transactions not covered by the statute. The ordinance is not inconsistent with the statute."

See also Village of Struthers v. Sokol, 108 Ohio St., 263, 140 N. E., 519, and Dallmann v. Kluckesky, 229 Wis., 169, 282 N. W., 9.

Arguments have been made with respect to the validity and interpretation of other provisions of the three Columbus ordinances involved in the instant cases. However, in view of our conclusion that the allegations of plaintiffs' petitions and the provisions of the 1954 ordinance require dismissal of plaintiffs' petitions, anything that we might say with respect to other provisions of those three ordinances or their validity would represent the consideration of something not necessary to sustain the judgments being rendered and hence might be considered as dicta.

Judgments affirmed.

Weygandt, C. J., Zimmerman, Bell and Matthias, JJ., concur.

Stewart, J., concurs in the judgment.

Herbert, J., dissents.

THE SUPREME COURT OF OHIO

RAY M. BENJAMIN ET AL.,
Plaintiffs-Appellants,
vs.
CITY OF COLUMBUS ET AL.,
Defendants-Appellees.
No. 35179

G. D. FERGUSON ET AL.,
Plaintiffs-Appellants,
vs.
CITY OF COLUMBUS ET AL.,
Defendants-Appellees.
No. 35180

CERTIFICATE

I, Elliot E. Welch, clerk of the Supreme Court of the state of Ohio, do hereby certify that the foregoing notice of appeal, motion to certify record, assignment of errors, and application for rehearing, in each of the above entitled cases, are truly taken and correctly copied from the originals on file in this office; that the foregoing is a true and correct copy of transcript of docket and journal entries of this court in each case; that the foregoing is a true and correct copy of the printed record filed in each case in this court; that the foregoing is a true and correct copy of the opinion rendered in the above entitled cases by this court (167 Ohio State, page 103); and that the foregoing is the

original copy of the praecipe for certified transcript of record filed in this court in each of the above entitled cases.

In Witness Whereof, I have hereunto set my hand and affixed hereto the seal of the Supreme Court of Ohio, at

Columbus, Ohio, this ..... day of ....., A. D., 1958.

.....

Clerk of the Supreme Court of Ohio.

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No. 884

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

RAY M. BENJAMIN, ET AL.,
Petitioners,

vs.

THE CITY OF COLUMBUS, ET AL.,
Respondents.

G. D. FERGUSON, ET AL.,
Petitioners,

vs.

THE CITY OF COLUMBUS, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

WAYMON BELTON MCLESKEY,
OWEN B. SHERWOOD,
Attorneys for Petitioners.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. .....

RAY M. BENJAMIN, ET AL.,
Petitioners,

vs.

THE CITY OF COLUMBUS, ET AL.,
Respondents.

G. D. FERGUSON, ET AL.,
Petitioners,

vs.

THE CITY OF COLUMBUS, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioners pray that a writ of certiorari issue to review the judgments of the Supreme Court of Ohio, entered in the above entitled causes on the eighteenth day of December, 1957.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals of the Second District, reversing a judgment on the pleadings in the Ferguson case is printed in Appendix A hereto, infra, pp. 21-38, and is reported in 70 Ohio Law Abstract, 277 (unofficial). The opinion of the trial court on the merits in both the Ferguson and Benjamin cases, which were heard together, is printed in Appendix B hereto, infra, pp. 38-52, and is reported in 73 Ohio Law Abstract, 143 (unofficial). The opinion of the Court of Appeals of the Sixth District on the merits in both cases, is printed in Appendix C hereto, infra, pp. 52-62, and is as yet unreported. The opinion of the Supreme Court of Ohio, one judge concurring in the judgment only and one judge dissenting, is printed in Appendix D hereto, infra, pp. 62-82; R. 255-276, and is reported in 167 Ohio State, 103.

JURISDICTION

The judgments of the Supreme Court of Ohio were entered on the eighteenth day of December, 1957, and are printed in Appendix E hereto, infra, pp. 82-83; R. 234-235; 246. Timely applications for re-hearings were filed on the thirty-first day of December, 1957 (R. 238-243; 250-255); and were denied on the fifteenth day of January, 1958 (R. 235, 246). The jurisdiction of this court is invoked under 28 U. S. C., Section 1257 (3), since the validity of three ordinances enacted by the council of the city of Columbus, Ohio, on grounds of repugnancy to the Constitution of the United States, is drawn in question.

QUESTIONS PRESENTED

1. Whether in enacting Ordinance No. 1615-54, prohibiting the possession, custody or control of pin games at any place within the city of Columbus, Ohio, whether public or private and regardless of whether said games be operated for purposes of amusement or otherwise, the council of said city took property of the petitioners without due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States, when pin games owned by them are, admittedly, being operated within said city for amusement purposes only.

2. Whether in enacting Section 2 of Ordinance No. 156-53, prohibiting the exhibition of any game which tends to encourage gambling, and Section 1 of Ordinance No. 157-53 prohibiting the exhibition of any game (1) which tends to encourage gambling, (2) which registers odds or a score, or (3) which may readily be converted into a gambling device, the council of the city of Columbus, Ohio, denied the equal protection of the law, within the meaning of the Fourteenth Amendment to the Constitution of the United States, to petitioners who are admitted to be exhibitors of pin games for amusement purposes only, when said city has announced its intention of enforcing said ordinances against said pin games and of ignoring all other games which come within the provisions of said ordinances.

3. Whether the phrases "which in no way tends to encourage gambling," contained in Section 1 of Ordinance No. 156-53; "which tends to encourage gambling," contained in Section 2 of said ordinance; "which tends in any way to encourage gambling," contained in Section 3 of said ordinance; "which tends to encourage gambling * * *" or which is adapted or may readily be converted into such

gambling device, or instrument," contained in Section 1 of Ordinance No. 157-53; and "any device easily convertible to automatic payoff or free play by slight changes in, or addition to the mechanical structure," contained in Section 4 of said Ordinance No. 157-53—all as enacted by the council of the city of Columbus, Ohio—are so vague, indefinite and uncertain as to constitute a denial of due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

4. Whether in the enactment of Section 3 of Ordinance No. 156-53 which provides that the city auditor of Columbus, Ohio may not issue a license or registration for any machine, device or instrument which tends to encourage gambling, and in the enactment of Section 1 of Ordinance No. 157-53 which provides that every game (1) which tends to encourage gambling or (2) which registers odds or a score, or (3) which may readily be converted into a gambling device, shall be subject to seizure by any police officer of said city, the council of the city of Columbus, Ohio attempted to confer judicial power on both said auditor and police officer and thereby deprived petitioners of due process of law as well as of the equal protection of the law within the meaning of the Fourteenth Amendment to the Constittuion of the United States.

5. Whether the enactment of Ordinances Nos. 156-53, 157-53, and 1615-54 by the council of the city of Columbus, Ohio, impaired the obligation of contracts which petitioners then and now hold with merchants in said city for the operation of pin games for amusement purposes only within the meaning of Article I, Section 10 of the Constitution of the United States.

6. Whether Ordinances Nos. 156-53, 157-53, and 1615-54 as enacted by the council of the city of Columbus, Ohio are so unreasonable, arbitrary and capricious as to constitute

an unreasonable exercise of the police power and, therefore, a denial of due process of law to petitioners within the meaning of the Fourteenth Amendment to the Constitution of the United States.

7. Whether the refusal of the Supreme Court of Ohio to consider the evidence offered by the petitioners in the trial court, tending to show that the games operated by the petitioners do not have evil potentialities (R. 270-271) amounted to a denial to petitioners of due process of law as well as of the equal protection of the law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONS, STATUTES AND ORDINANCES INVOLVED

The constitutional provision involved is Article XVIII, Section 3 of the Ohio Constitution (Appendix, Page's Ohio Revised Code Annotated, p. 587), which reads:

> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

The statute involved is Section 715.51 of the Revised Code of Ohio (Title 7, Page's Ohio Revised Code Annotated, p. 162), which reads:

> "Any municipal corporation may:
> (A) Regulate billiard and pool tables, nine or ten pin alleys or tables, and shooting and ball alleys;
> (B) Authorize the destruction of instruments or devices used for the purpose of gambling."

The ordinances involved are Nos. 156-53 and 157-53 (Volume 38, Columbus City Bulletin, p. 128), and No. 1615-54 (Volume 39, Columbus City Bulletin, p. 983),

enacted by the council of the city of Columbus, Ohio, and are printed in Appendices F, G and H hereto, infra, pp. 84-92.

STATEMENT OF THE CASES

On the tenth day of March, 1953, Ordinances Nos. 156-53 and 157-53 were enacted by the council of the city of Columbus, Ohio, and became effective on the tenth day of April, 1953. Section 2 of Ordinance No. 156-53 prohibits, among other things, the exhibition of any game which tends to encourage gambling. Section 1 of Ordinance No. 157-53 prohibits, among other things, the exhibition of any games (1) which tend to encourage gambling, (2) which registers odds or a score, or (3) which may readily be converted into a gambling device. Section 3 of Ordinance No. 156-53 authorizes the city auditor to deny a license for any machine which tends to encourage gambling. Section 1 of Ordinance No. 157-53 authorizes any police officer to seize any such machine so exhibited.

On the twenty-sixth day of March, 1953, the petitioners filed their petition in the Ferguson case in which they sought a declaratory judgment and injunction. They alleged, among other things, that they were engaged in the business of owning and operating amusement games in said city; that they owned and operated approximately 540 games having a total value of approximately $200,000.00, and that they had been in the business from 5 to 17 years. (R. 22) After describing the manner in which the games are operated, the petition alleges that:

> "* * * each player receives identically the same number of marbles or balls or pucks from said machine for each 5¢ inserted therein; that he endeavors to make as high a score as possible; that no merchandise, checks, tokens or any other objects whatsoever are

released by said game; that said game does not give any return or free-play or plays; that upon playing said game the player receives in return for his money amusement only;" (R. 23)

On the fifteenth day of February, 1954, respondents filed a motion for judgment on the pleadings, which motion was, on the nineteenth day of July, 1954, sustained, and the action dismissed. An appeal on questions of law was thereupon perfected to the Court of Appeals of the Second District, which court, on the thirtieth day of November, 1954, reversed that judgment on the grounds, among others, that (1) issues of fact were involved and the judgment was accordingly prematurely entered, and (2) the authority given to (a) the city auditor to deny a license and (b) a police officer to seize such games, was an unlawful delegation of judicial power. (Appendix A hereto, infra, pp. 21-38)

On the seventh day of December, 1954, the city council of Columbus, Ohio, passed Ordinance No. 1615-54, effective immediately, which ordinance prohibits the possession, custody or control of these games. On the eighth day of March, 1955, petitioners filed their petition in the Benjamin case in which they also sought a declaratory judgment and injunction.

The Ferguson and Benjamin cases were consolidated, and on the fifteenth day of November, 1955, were tried together on the merits. The majority of the allegations in each petition were not in dispute.

On the twenty-ninth day of May, 1956, the trial court entered its judgment finding and declaring all three ordinances to be "invalid, unconstitutional and void, insofar as they prohibit the ownership, possession, custody, control and operation of pin games for amusement purposes only" and permanently enjoined the city of Columbus "(a) from interfering * * * with the ownership, possession, cus-

tody, control and operation of said pin games * * * as well as (b) from * * * interfering with or molesting any merchant with whom said plaintiffs have either heretofore had, or may hereafter have contracts for the operation of said games so long as said games are not used for gambling, * * *." (R. 34)

Thereupon respondents perfected appeals on questions of law and fact to the Court of Appeals of the Second District and the Court of Appeals of the Sixth District, sitting by designation, held that all three ordinances are not in violation of the Fourteenth Amendment to the Constitution of the United States, and dismissed each action. (Appendix C hereto, infra. (pp. 52-62; R. 19-20; 41-42)

The petitioners then perfected appeals involving constitutional questions to the Supreme Court of Ohio, which court, on the eighteenth day of December, 1957, affirmed the judgments of the Court of Appeals of the Sixth District and on the fifteenth day of January, 1958, denied timely applications for re-hearings. (R. 234-236; 245-247)

HOW FEDERAL QUESTIONS ARE PRESENTED

The federal questions presented by this petition were specifically raised in the trial court and Court of Appeals (the latter being a de novo hearing on the same pleadings) by the petition in each case. (R. 1-9; 21-28) The petition in each case contains specific references to the appropriate sections of the Constitution of the United States involved. (R. 5-7; 24-28) Questions 1 to 6 inclusive were raised in the Supreme Court of Ohio by the pleadings, and assignments of error in each case (R. 237-238, 249), and question 7, which arose for the first time in the Supreme Court of Ohio, was specifically raised by applications for re-hearings in that court. (R. 242-243, 254)

Questions 1, 2, 5 and 6 were answered in the negative by the Supreme Court of Ohio in its opinion printed in Appendix D hereto, infra, pp. 62-82; R. 255-276. In the last paragraph of its opinion the Supreme Court declined to answer questions 3 and 4 on the ground that such answers "might be considered as dicta," Appendix D hereto, infra, p. 82; R. 276. Question 7 was answered in the negative by a denial of the petitioners' applications for re-hearings (R. 235, 246).

REASONS FOR GRANTING THE WRIT

1. When the motions to certify the records of the Court of Appeals in these cases were submitted to the Supreme Court of Ohio, respondents conceded in their brief that "the questions involved are of public and great general interest" and that court allowed each motion on that ground. The federal questions presented by this petition have constantly been before other state and federal courts throughout the United States. State courts in Florida, Illinois, New Jersey, Oklahoma, Pennsylvania, and Texas have decided these questions in a manner directly opposite from the decision of the Supreme Court of Ohio in the instant cases. *Deeb v. Stoutamire*, 53 So. (2d), 873 (Fla.); *People v. One Slot Machine*, 303 Ill. App., 337; *People v. One Pin Ball Machine*, 316 Ill. App., 161; *State v. Betti*, 23 N. J. Misc., 169; *Sterling Distributors Inc. v. Director of Public Safety*, 135 N. J. Eq., 508; *Couch v. State*, 71 Okla. Cr., 223; *In re: Petition of Chief County Detective*, 54 Dauphin County Reports, 16 (Penn.); *Commonwealth v. Handmore*, 60 Dauphin County Reports, 416 (Penn.); *Urban's Appeal*, 148 Super. Ct., 101 (Penn.); *Commonwealth v. Mihalow*, 142 Super. Ct., 433 (Penn.); *Wiaton's Return*, 151 Super. Ct., 337 (Penn.); *Hightower v. State*, 156 S. W. (2d), 327 (Texas).

The classification for purposes of federal taxation under 26 U. S. C., Sections 4661-4663 of pin games equipped to give free games and payoffs was decided by this Court in *United States v. Korpan*, 354 U. S., 271. Similar tax questions involving these games have been decided by the lower federal courts. *Johnson v. Phinney* (C. A. 5), 218 Fed. (2d), 303; *United States v. Two (2) "Exhibit Rotary" Coin Operated Gambling Devices* (D. C. Okla.), 107 Fed. Sup., 314; *Robique v. Lambert* (D. C. La.), 114 Fed. Sup., 305 (affd. 214 Fed. (2d), 3 (C. A. 5)); *Tooley v. United States* (D. C. Nev.), 134 Fed. Sup., 162.

Petitioners also claim that in the instant cases the Supreme Court of Ohio has decided important and substantial questions which have not heretofore been determined by this Court or has decided them in a way which is probably not in accord with the applicable decisions of this Court.

2. This Court has held that where, as in the instant cases, a suit is brought to this Court from a state court which involves the constitutionality of ordinances enacted by a municipal corporation in that state, this Court will, when necessary, put its own independent construction upon such ordinances. *Yick Wo v. Hopkins*, 118 U. S., 356.

3. The record shows that the pin games involved in these cases are not equipped to give free games or payoffs but have been played for amusement purposes only (R. 80, 110-111, 114, 117, 121, 127-128, 142). It was so held by the trial court who heard the testimony. (Appendix B hereto, infra, pp. 45, 51) They were so treated by both Court of Appeals (Appendices A and C hereto, infra, pp. 24, 55) and the Supreme Court of Ohio. (Appendix D hereto, infra, p. 64; R. 257). They are, therefore, nothing but amusement devices within the meaning of 26 U. S. C., Section 4462 (a) (1). *United States v. Korpan*, 354 U. S., 271, is not controlling in the instant cases because, as above stated, the

games there involved were equipped to give free games and payoffs. They were therefore, classified by this Court under 26 U. S. C, Section 4662 (a) (2).

4. Petitioners claim that where, as in the instant cases, pin games are operated purely for amusement purposes only, such operation is a business which may be regulated but which may not be prohibited by a municipality as has been attempted in these ordinances. The Court of Appeals of the Second District so held. (Appendix A hereto, infra, pp. 24-25) The trial court so held on the evidence. (Appendix B hereto, infra, p. 51) A classic statement of the general rule is found in 10 *Ohio Juris.* (2d), 506, Sections 428-429, which read as follows:

> "428. No trade can be prohibited altogether unless the evil is inherent in the character of the trade. Any law which prohibits altogether an occupation the prosecution of which does not necessarily work an injury to the public is unwarranted. It is not sufficient that the public sustain harm from a certain trade or employment as it is conducted by some who are engaged in it. Nor is it sufficient that all remedies for the prevention of the evil which fall short of total prohibition prove defective. The fact that many men engaged in the calling persist in so conducting the business that the public suffer, and their actions cannot otherwise be effectually controlled, is no justification for a law which prohibits an honest man from conducting the business in such manner as not to inflict injury upon the public.
>
> "429. If a business or occupation can be prosecuted under certain limitations so as to avoid injury to others, the police regulation must be confined to the imposition of these needed restrictions and the trade cannot be absolutely prohibited."

That the right to pursue an ordinary trade or business is protected by the Fourteenth Amendment has been consistently recognized by this Court. *Powell v. Pennsylvania,*

127 U. S., 678, 684, *Allgeyer v. Louisiana*, 165 U. S., 578, 589; *Meyer v. State of Nebraska*, 262 U. S., 390, 399. Petitioners, therefore, claim that so long as pin games are, as in the instant cases, used for amusement only it is a lawful business and any ordinance which attempts, as here, to prohibit such operation amounts to a denial of due process of law under that amendment. No claim is made that the operation of these games is an inherently evil business. It has been repeatedly held by the Ohio courts that these games are not gambling devices per se. *Brafford v. Calhoun*, 72 Ohio App., 333; *Wells v. City of Norwood*, 64 Ohio Law Abstract, 53; *Benjamin v. City of Columbus*, 73 Ohio Law Abstract, 143.

The mere possibility that these games may be used as a means for gambling does not justify their prohibition. If this were true all games would be subject to prohibition because they have the same possibility. It is, therefore, a case for reasonable regulation instead of prohibition. *Carolene Products Company v. Thomson*, 276 Mich., 172; *Carolene Products Company v. Banning, et al.*, 131 Neb., 429; *Erwin Billiard Parlor v. Buckner*, 156 Tenn., 278; *Riley v. Sweat*, 110 Fla. 362; *Sports Daily v. Public Service Commission*, 179 Md., 355, 359; *Hagerman v. City of St. Louis*, 283 S. W. (2d), 623 (Mo.). This is especially true since these ordinances prohibit the possession of these games at any place within the city limits, whether public or private. In fact, the trial court said that these ordinances would make it a crime to have these games in a private home for purely private use. (Appendix B hereto, infra, p. 51) In *Dallman v. Klachesky*, 229 Wisc., 169, the court said that if such a prohibition extended throughout the city "there might be some doubt as to the reasonableness of the ordinance." We, therefore, claim that these ordinances are too broad and sweeping to meet the test of

the Fourteenth Amendment. Where such ordinances have been limited to places of business or other places of public resort, the California courts have upheld them on the ground that they are purely regulatory. *In re: Lawrence*, 55 Calif. App. (2d), 491; *Sharpe v. Johnson*, 81 Calif. App. (2d), 939.

The Ohio courts which have upheld these ordinances relied, among other authorities, upon *Murphy v. California*, 225 U. S., 623. As stated by this court in that case, "Playing at billiards is a lawful amusement * * *." (p. 629) In fact, many people have billiard tables in their family recreation rooms. We submit, however, that the *Murphy* case is not in point for the following reasons:

(a) The ordinance there involved sought not to prohibit the operation of billiard halls but to regulate them by limiting their operation to hotels having 25 or more rooms (pp. 627-628).

(b) The ordinance was "not aimed at the game but at the place" (p. 629). In the instant cases these ordinances are aimed at the game rather than at the place because their operation is prohibited within the limits of the municipality.

(c) This Court apparently held that an ordinance regulating billiard halls is not prohibited by the Fourteenth Amendment where such ordinance is not in conflict with or prohibited by the Constitution or statutes of the state. In the summary of the brief of the defendant-in-error in that case it is stated that under Article XI, Section 11 of the California Constitution, municipalities were authorized either to regulate or prohibit and that under such power they could prohibit that which is not a nuisance per se (p. 626). This Court, therefore, held that under the Constitution and statutes of California, South Pasadena was authorized to enact this ordinance regulating billiard halls

(p. 630). We maintain, however, that both the Constitution and statutes of Ohio deny to the municipality the right to enact these three ordinances prohibiting pin games. Article XVIII, Section 3 of the Ohio Constitution (infra, p. 5), provides that "municipalities shall have authority * * * to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." It will be observed that this section uses the word "regulation" instead of "prohibition". In *Frecker v. City of Dayton*, 88 Ohio App., 52, the Court of Appeals of the Second District held that the word "regulation" as used in that section does not include the word "prohibition" unless the occupation, trade or business is an inherently evil one. This decision was affirmed by the Supreme Court of Ohio in *Frecker v. City of Dayton*, 153 Ohio St., 14. Inasmuch as the operation of these pin games is not an inherently evil occupation, trade or business, we claim that these three ordinances are in conflict with said provision of the Ohio Constitution. Furthermore, Section 715.51 of the Revised Code of Ohio (infra, p. 5), provides that "any municipal corporation may * * * (B) Authorize the destruction of instruments or devices used for the purpose of gambling." Inasmuch as these pin games have not been used for gambling we claim that these three ordinances which prohibit their use for any purpose are in conflict with said statute. If, therefore, we are correct in our contention that these ordinances are in conflict with the statutes and Constitution of Ohio then it would seem that under the *Murphy* case they are barred by the Fourteenth Amendment.

(d) No claim was made in the *Murphy* case that the ordinance was being unequally enforced (p. 631). In the instant cases we claim that the petitioners are being denied

the equal protection of the law in that Ordinances Nos. 156-53 and 157-53 are being unequally enforced.

(c) The *Murphy* case clearly recognizes the distinction between regulation and prohibition. In the first head note this Court held that "While the Fourteenth Amendment protects the citizen in his right to engage in any lawful business, it does not prevent legislation intended to regulate useful occupations, which because of their nature and location, may prove injurious or offensive to the public." In the second head note the court held that "The Fourteenth Amendment does not prevent a municipality from prohibiting any business which is inherently vicious and harmful." This distinction was also recognized by this Court in *McCloskey v. Tobin, Sheriff*, 252 U. S., 107. Under the Fourteenth Amendment, therefore, any business which is inherently vicious and harmful may be prohibited but any business which is not inherently vicious or harmful but which might, because of its nature or location, become so can only be regulated. While we do not concede that pin games may become injurious or offensive to the public, we do concede that they may be regulated.

5. Sections 1 and 6 of Ordinance 157-53 prohibit the operation of any game which, as a result thereof, registers a score. In *Ferauson v. City of Columbus* (70 Ohio Law Abstract, 277), the Court of Appeals of the Second District held that the registration of a score is not an element of gambling. If the respondents desired to be fair, they would, in the enforcement of these ordinances, seize and confiscate any game which registers a score because the ordinances by their express terms would apparently justify such action. Instead of doing so, however, the respondents have expressed an intention of seizing and confiscating no games except pin games (R. 31; 85-87; 125-126). This Court will take judicial notice of the fact that every sport

or contest registers some kind of a score; that any amusement device or game can be the means of gambling and that people gamble with cards or on the outcome of bowling, tennis, golf, football, baseball and other games of amusement. To single out, therefore, an amusement device or game and seize and confiscate it merely because it happens to use a pinball whereas some other game uses a different kind of ball is discrimination in the enforcement of the law. If one game is to be seized because it might be used for gambling then all games having similar possibilities should likewise be seized. If, therefore, we assume that these ordinances are lawful on their face and fair in their terms, their enforcement would be of such a character as to work a discrimination among those who legally come within their provisions and would, therefore, deny to the petitioners the equal protection of the law within the meaning of the Fourteenth Amendment. *Yick Wo v. Hopkins*, 118 U. S., 356, 373-4; *Dobbins v. Los Angeles*, 195 U. S., 223. Such discrimination is unreasonable because it offends "the plain standards of common sense." *Hartford Steam Boiler Inspection and Insurance Company v. Harrison*, 301 U. S., 459, 462.

In *Loof v. City of Long Beach* 314 Pac. (2d), 518 (Calif. App.), decided on the twelfth day of August, 1957, an action was brought to restrain the enforcement of an ordinance regulating games in that city. The ordinance prohibited a balloon-dart concession and a knife throwing concession but permitted games of archery, baseball, basket ball and quoits. Both groups of games included some factors of skill. The court held (1) that evidence bearing on the question of unreasonable discrimination in prohibiting the first group of games was admissible and (2) that the classification was unreasonable and, therefore, amounted

to a denial of the equal protection of the law under the Fourteenth Amendment.

6. Section 3 of Ordinance No. 156-53 provides that the city auditor shall not issue a license or registration for any game which tends to encourage gambling. Section 4 of Ordinance No. 157-53 provides that every game which tends to encourage gambling shall be subject to seizure by any police officer. In determining whether these games tend to encourage gambling the ordinance sets up no standard by which such city auditor or officer may be guided but leaves such determination to his sole discretion. The ordinance, therefore, attempts to confer judicial power on both the auditor and the police officer and thereby deprives the petitioners of due process of law as well as of the equal protection of the law within the meaning of the Fourteenth Amendment. *Ferguson v. City of Columbus*, 70 Ohio Law Abstract, 277; *Yick Wo v. Hopkins*, 118 U. S., 356; *Panama Refining Company v. Ryan*, 293 U. S., 388; *Schechter v. United States*, 295 U. S., 495.

7. Certain phrases contained in Ordinances Nos. 156-53 and 157-53 are so vague, indefinite and uncertain as to constitute a denial of due process of law within the meaning of the Fourteenth Amendment. These phrases are, "which in no way tends to encourage gambling," contained in Section 1 of Ordinance No. 156-53; "which tends to encourage gambling," contained in Section 2 of said ordinance; "which tends in any way to encourage gambling," contained in Section 3 of said ordinance; "which tends to encourage gambling," contained in Section 1 of Ordinance No. 157-53; "which is adapted or may readily be converted into such gambling device, or instrument," contained in Section 1 of Ordinance No. 157-53; and "any device easily convertible to automatic payoff or free play by slight changes in, or additions to the mechanical structure," contained in Sec-

tion 4 of said Ordinance No. 157-53. This Court has repeatedly held that any statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess as to its meaning and differ as to its application, lacks the first essential of due process of law. *Collins v. Kentucky*, 234 U. S., 634; *Connolly v. General Construction Co.*, 269 U. S., 385; *Lanzetta v. New Jersey*, 306 U. S., 451; *Burstyn v. Wilson*, 343 U. S., 495; *United States v. Cardiff*, 344 U. S., 174.

We contend that these phrases fail to meet the requirements of due process within the meaning of the Fourteenth Amendment. They are so vague, indefinite and uncertain that men of common intelligence must necessarily guess as to their meaning and differ as to their application. We doubt if any two judges or lawyers would agree in a given situation as to their meaning and application.

8. Petitioners allege that the respondents have threatened to arrest the merchants who operate these games under contract in their business establishments; that said merchants have been placed in fear by said threats and have proposed to remove said games from their premises—all in impairment of the obligation of the petitioners and said merchants under said contracts and in violation of Article I, Section 10 of the Constitution of the United States. (R. 5-6; 24-25) It is well settled that a municipal ordinance is a "law" withir the meaning of that provision of the federal Constitution; that the word "contract" is used in its usual and popular sense (*Crane v. Hahlo*, 258 U. S., 142, 146), and that an "impairment" results where a legislative act takes from a party thereto a right to which he is entitled thereunder. If, therefore, as in the instant cases the obligation is entirely destroyed, then

that obligation has certainly been impaired. We recognize the fact that this constitutional provision is subject to a reasonable exercise of the police power. We maintain, however, that the enactment of these ordinances was an unreasonable exercise of such power.

9. Petitioners claim that these ordinances are so unreasonable, arbitrary and capricious that their enactment amounted to an unreasonable exercise of the police power and, therefore, a denial of due process of law within the meaning of the Fourteenth Amendment. *Nebbia v. New York*, 291 U. S., 502, 525. They prohibit the possession, custody or control of games which have been played for amusement only. There is nothing in this record which shows that the prohibition of these games as distinguished from their regulation is essential to the public welfare.

10. On page 114 of its opinion, Appendix D hereto, infra, pp. 77, R., 270-271, the Supreme Court of Ohio refers to evidence offered by the petitioners in support of their contention that these games do not have evil potentialities. The court then quotes from *Murphy v. California*, 225 U. S., 623, to the effect that judicial notice may be taken that billiard halls do have such potentialities. Billiard games and pin games are, of course, two different types of amusement. If, however, we assume that they have similarities, judicial notice merely relieves the party who ordinarily would be required to prove a given fact from the necessity of so doing. We do not understand that that rule either precludes or prohibits the adverse party from introducing evidence to the contrary. *Ohio Bell Telephone Company v. Public Utilities Commission of Ohio*, 301 U. S., 292, 301-2. It would seem, therefore, that the evidence offered by the petitioners should have been considered by that court and that its failure to do so amounted to a denial

of due process within the meaning of the Fourteenth Amendment.

CONCLUSION

For the foreg ing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

WAYMON BELTON MCLESKEY,
OWEN B. SHERWOOD,
Attorneys for Petitioners.

APPENDIX A

No. 5156—C. D. Ferguson, et al., Plaintiffs-Appellants, v. The City of Columbus, et al., Defendants-Appellees.

Opinion of the Court of Appeals

(Rendered on the 30th day of November, 1954.)

By the Court:

This is an appeal on questions of law from a judgment of the Common Pleas Court sustaining a motion of the defendant, The City of Columbus for judgment on the pleadings, and dissolving a temporary restraining order.

The pleadings were a petition and an amended joint answer. The petition sought a temporary restraining order and permanent injunction to prevent the city from seizing and destroying certain pinball games in possession and use on merchants in the City of Columbus, so long as the pin games described in the petition are played for the purpose of amusement only, and not played in any manner in violation of such of the provisions of the ordinances set out in the petition which plaintiffs concede to be valid. A temporary restraining order was allowed by one branch of the Common Pleas Court, as follows:

> "The court orders, adjudges and decrees that a temporary restraining order against the defendants be and the same is hereby allowed, as prayed for in the petition, so long as the pin games described in the petition are played for the purpose of amusement only, and so long as the players thereof do not win or receive, directly or indirectly, any merchandise, cash, checks, tokens, freeplays or anything of value as a prize or reward for playing any of said pin games. In the event that any of said pin games are played as gambling devices, i.e., in the event that any merchandise, cash, tokens, checks, freeplays or anything of value is won or received, directly or indirectly, by the player as a prize or reward for playing any of said pin games

described in the petition, or played as gambling devices in any way, the defendants shall be permitted to seize them whenever they are so played and to destroy them in accordance with law."

We analyze the pleadings to determine if they present an issue on any material averment of the petition which, if resolved in favor of the plaintiffs would entitle them to any of the relief prayed for.

(1) The petition alleges the corporate and official capacities of defendants and that the officer defendants are charged with the enforcement of the ordinances set out, viz.: Nos. 156-53 and 157-53 of the Ordinances of the City of Columbus, Ohio; that plaintiffs own and operate 540 amusement games known as pin games of the value of one hundred ninety-nine thousand dollars; that they are operated by merchants in the City of Columbus under contract with the plaintiffs, both parties sharing the profit. All of the foregoing is admitted by the answer.

(2) Plaintiffs further aver that under and by virtue of the above-mentioned ordinances, the defendant officers threaten to seize the games, to confiscate them and to arrest and imprison the merchants with whom said plaintiffs have contracts. The answer admits that the defendant officers are threatening to seize the games operated by plaintiffs but by their general denial deny that they are threatening to confiscate the games or to arrest and imprison the merchants with whom plaintiffs have contracts.

(3) The method of operation and play and the mechanical construction of the pin games is set out in detail. This is admitted by the answer.

(4) It is further averred that no merchandise, checks, tokens, or any other objects are released by said game; that there is no return or free-plays; that each player receives identically the same number of balls from each

machine for each five cents inserted therein; that the player endeavors to make as high a score as possible and that the play is for amusement only; that said games do not tend to encourage gambling and are not gambling devices within the meaning of said ordinances. All of the foregoing under (4) is denied.

(5) The petition further avers that the ordinances are unconstitutional in that they, 1. Authorize seizure and confiscation of games without proof of their use for gambling purposes; 2. They impair the obligation of contract; 3. They take owner's property without due process of law; 4. Are so vague, indefinite and uncertain as to constitute a denial of due process of law; 5. Deny the owners equal protection of the law; 6. Constitute an unreasonable exercise of "Police Power"; attempt to delegate judicial and/or legislative power. All of the foregoing under (5) is denied.

(6) The petition further avers that the ordinances described in the petition amended former ordinances which permitted the licensing and registration of the games owned and operated by plaintiffs. This is admitted.

There are certain controlling legal principles which we briefly state as preliminary to consideration and determination of this appeal.

A motion for judgment on the pleadings should be overruled if the pleadings disclose an issuable fact, or a direct issue, joined upon a single material proposition which require the introduction of testimony. If the averments of the petition are sufficient to stand against a general demurrer, judgment on the pleadings may not be granted. The motion presents only a question of law. Before the motion may be sustained it must be held, as a matter of law, that the plaintiff has stated no cause of action. Meyer v. Daniel, 147 O. S. 27. Vest v. Kramel, 158 O. S. 78; Zepp v. City of Columbus, 50 O. App. 47. The Court should exer-

cise great caution in sustaining a motion for judgment on the pleadings. Ellis v. Electric Products, Inc., 85 O. App. 170. The Court is required to construe the pleadings liberally in favor of the party against whom the motion is made. If the petition states no cause of action supporting any relief prayed, the judgment must be affirmed. If the petition states a cause of action and the answer denies any material averment of the petition an issue is drawn which must be resolved upon testimony adduced.

The ordinances involved are lengthy and we shall not undertake to set them out in their entirety, making reference only to those sections which, though numerous and lengthy, it is necessary that we consider to determine the questions presented.

We first give attention to the penalty and confiscation provisions of the sections of the ordinances. Plaintiffs aver that the defendants are threatening to seize the games, to confiscate them, to arrest and imprison the merchants with whom the plaintiffs have contracts. The defendant officers admit only a purpose to seize the games but deny the other averments.

It is our conclusion that the ordinances given full force and effect, if the averments of the petition are proven, do not authorize, nor purport to empower, the defendant officers with the right to confiscate the machines, or to arrest and imprison the merchants with whom plaintiffs have contracts.

It is not contended by defendants that the machines are gambling devices per se, nor will the averments of the petition permit the conclusion that they are now or have been used as gambling devices or played for gain. Although both ordinances contain sections, which we hereinafter discuss, carrying controversial language that, in the main,

has provoked this suit, neither the penalty nor the confiscation sections of the ordinances incorporate or make a basis for punishment of the merchants or destruction of the machines, the provisions of the ordinances concerning which the principal issues are raised. We shall attempt to demonstrate this.

Section 36.60 of Ordinance No. 156-53 authorizes seizure and destruction of any machines, etc., pursuant to the provisions of 29.39, Chapter 29 of the 1952 Code of Columbus, if the machine

> "tends to encourage gambling *and* may be used in a manner violative of the Code of the City of Columbus, Ohio, 1952, Chapter 29, Sections 29.38, 29.38-1, 29.40, 29.42, 29.42-1, and 29.42-2, as they now are, or may hereafter be amended."

The provisions of Section 29.39, Chapter 29, of the 1952 Code of Columbus authorize destruction only upon adjudication "by the Courts" that such machines were used for the purpose of gambling. Nor does this section, as amended, empower defendants to seize or destroy the machines, if plaintiffs maintain the averments of their petition. It is a prerequisite of this section, to authorize the seizure or *destruction* of the machines, that they "be used for the purpose of gambling, or on, by, or with which money or any other thing or article of value may be won or lost". That is to say, that the machines must be per se gambling devices or used for gambling before they can be destroyed. This authorization is as broad but no broader than the law authorizing the seizure and destruction of contraband articles. The section further provides that a machine shall not be demolished or destroyed except upon direction of the Mayor or the Director of Public Safety, "upon it being adjudged by the courts that such machines, devices or instruments were used, kept or intended for the purpose of gambling". Clearly a valid enactment.

The fine and sentence provisions are all found in Ordinance No. 157-53. The first is Section 29.38-1:

> "Whoever in the city permits any game whatsoever to be played for gain upon or by means of any machine, device or instrument, of whatever denomination or name, upon the premises of which he has the care or possession shall be fined", etc.

Upon the petition the merchant operators could not be convicted under this section of the ordinance because it is averred that the machines are not played for gain.

The next penal section is 29.42 of Ordinance No. 157-53:

> "Any person who shall within the city * * * have in his possession for any commercial use, financial gain, or compensation, any coin or token operated gambling device, shall be guilty of a misdemeanor and upon conviction thereof shall be fined, etc. * * * For the purpose of this section, 'gambling device' shall mean and include any device having an automatic pay-off or an automatic free-play mechanism or any device easily convertible to automatic pay-off or free-play by slight changes, in, or addition to the mechanical structure, or any coin or token operated device actually used for gambling purposes, any of which in the operation of such device the player stands a chance to gain an award or property of greater value than the consideration paid."

The amended petition will not permit of the conclusion that the machines there described in detail are included in the foregoing definition of a "gambling device", and the section does not authorize the arrest of the merchant operators of the machines.

The next penalty section is 29.42-1:

> "Whoever keeps or exhibits for gain a coin-in-slot machine or device, where the merchandise, property or checks obtained by play or operating such machine or device is not for each operation thereof substantially equal in value or where the number of units of property or checks is not, for each operation, equal in number and value, shall be fined", etc.

This section also makes it an essential to conviction that the machine be kept or exhibited for gain and the other conditions of the section must apply. They are not found or inferable from the petition.

Neither Section 29.38-1, Section 29.42, Section 29.42-1 of Ordinance No. 157-53, nor Section 25.30 of Ordinance No. 156-53 authorizes the arrest of the merchants with whom defendants have contracted, or the confiscation of any of the machines involved, if the averments of the petition are proven.

The next section, 29.42-2:

> "Whoever exhibits, operates or permits the operation of any machine, device or instrument whether or not it purports to vend or distribute merchandise or to furnish recreation or amusement, which is caused to operate by the insertion of any token, slug or disc, or exhibits or operates, or permits the operation of any machine, device or instrument which is caused to operate by the insertion of any coin, whether such device, machine or instrument purports to vend or distribute merchandise or to furnish recreation or amusement, which as a result of such operation discharges one or more coins, tokens, slugs, or discs or other memorandum, *or which registers odds or a score of the result of operation which makes it possible for one user to receive more value than another user inserting a similar coin* shall be guilty of a misdemeanor and upon conviction thereof shall be fined," etc. (Emphasis ours)

It will be noted that this section does not specifically authorize the seizure, confiscation or destruction of the machines. It is a penal section providing for fine and imprisonment for violation. Of course, if the operators were convicted for its violation the machines could then be confiscated.

It may also be observed that if Section 35.30 of Ordinance No. 156-53, seizure and confiscation, be given full meaning, it is necessary to its violation that it be proven

not only that the operation of the machine tends to encourage gambling, but also that it offends against the provisions of one or more of the sections to which reference is therein made. But Section 29.42-2, penal only, is in the alternative. That is to say, the proof is sufficient if it appear either that the operation of the machine tends to encourage gambling or that any of the other specific terms of the section are violated.

If the plaintiffs can maintain the averments of their petition the merchant operators may not be successfully prosecuted under Section 29.42-2 of Ordinance No. 157-53. There is an issue in the pleadings, as to the violation of any of the provisions of this section of the ordinance. The petition avers categorically that the operation of plaintiffs' machines does not come within any of the inhibitions of the section. It must also be noted that the language of Section 29.42-2, hereafter discussed, relating to the registration of a score, etc., is different from that employed in Section 29.28, the nuisance section, which reads: "Or which registers odds or a score", without further qualification.

There is no issue on the question whether or not the machines register a score. This is asserted and admitted. However, the petition does not admit, nor is it averred by the defendants, that the registration of a score makes it possible for one user to receive more value than another user inserting a similar coin.

As it is alleged that the defendants are threatening not only to seize but to confiscate the machines and to arrest the operators of them, the petition alleging that they have no authority to confiscate and stating facts which, if true, support their contention, the court to which this case was presented, in the light of the other averments of the petition as to the destruction of property and multiplicity of

suits, should have exercised its discretion to determine whether or not any injunctive relief should have been accorded plaintiffs in the respect of arrest of the operators and the confiscation of the machines.

The materiality of the issue as to the right of defendant officers to seize the machines under the only other applicable Section, 29.38 of Ordinance No. 157-53, presents a more serious question. We have heretofore stated that there is no provision in Ordinance 156-53 which will support a seizure against the averments of the petition.

Section 29.38 provides:

> "It is hereby declared prejudicial to the public good, detrimental to the public morals and a nuisance, for any person to exhibit for the purpose of operating or to permit the operation of any machine, device or instrument in the City of Columbus, Ohio, of whatever kind or description, or by whatever name known or commonly referred to which *tends to encourage gambling, or which registers odds or a score*, or which is adapted, or may readily be converted into such machine, device or instrument that is adapted, for use in a manner violative of Sections 29.38-1, 29.42, 29.42-1, and 29.42-2 of this chapter, and every machine so exhibited or permitted to be operated shall be subject to seizure, *by any police officer of the city*, and no such machine, device or instrument so seized by any police officer of the city, whether under the authority of this section or Section 29.39 or otherwise, shall be returned to the owner or person claiming the same except pursuant to an order of a court of competent jurisdiction." (Emphasis ours)

This section permits the seizure of the machines if they register odds or a score without the qualifying language which is carried into the penalty section of Section 29.42-2. It also authorizes the seizure of the machines if their operation "tends to encourage gambling", another provision that is not carried into the other penalty provisions of the

ordinances. The section further authorizes any police officer to make the seizure, that is to say, if a police officer determines that the machines "tend to encourage gambling" he may seize them. This section of the ordinance not only sets out the essential requisites upon which seizure may be made, but incorporates the other sections of the ordinance and provides that if the machines come within any specific characterization of the section or are violative of any other named sections of the ordinances, they may be seized. We have heretofore referred to Section 29.38-1, Section 29.39, Section 29.42-1, and Section 29.42-2.

Section 29.38, especially as to some of its controverted terms raises the question whether the city has exceeded its police power in its enactment. Here it is admitted that the machines register a score and that is the only admission that the machines in their operation offend against any of the essentials of the penal provisions of the ordinances. Plaintiffs deny specifically that their machines tend to encourage gambling. Inasmuch as the section makes a machine the operation of which tends to encourage gambling subject to the ordinance, it is evident that this may be found independent of the other elements set out in the section which characterize the operation of the machines as a nuisance.

The provision for seizure, of Section 29.38 of the ordinance under consideration, is invoked upon the declaration that operations such as are therein defined constitute a nuisance which may be abated. The city has wide police power in defining and declaring what shall constitute a nuisance. Insofar as the section authorizes seizure of machines that are gambling devices, per se, or operate in a manner described which is recognized as gambling there is no doubt as to its validity, but

> "The mere declaration in an ordinance that it is enacted to protect public safety, health or morals will

not render it valid as being within the police power unless there is some reasonable relation between such purpose and the regulations prescribed."

Youngstown v. Kahn Bros. Bdgs. Co., 112 O. S. 654.

In Williams v. Sandles, 93 O. St. 92, it was held:

"It is competent for a lawmaking body to authorize the summary seizure of property incapable of any except illegal use. The police authority of the state may be properly invested with power and devices as are designed and intended for use in the commission of crime."

8 O. Jur. 450, 451.

"A municipality cannot arbitrarily by ordinance declare property to be a nuisance and destroy it unless it is, in fact, a nuisance."

8 O. Jur. 452; Deming v. Cleveland, 22 O. C. C. 1; Borger v. State, 1 O. C. C. N. S. 549, affd. without opinion, 70 O. S. 508; Grundstein v. Ashland, 25 O. N. P. N. S. 493.

"And whether a nuisance exists is a question of fact frequently to be determined from the evidence."

8 O. Jur. 452; Bliss v. Krous, 16 O. S. 54.

In Grieb v. Dept. of Liquor Control, 153 O. S. 77, it is said that,

"While the legislature may authorize the summary confiscation of property incapable of lawful use or of nuisances per se, if property which is innocent in its ordinary and proper use has been used for unlawful purposes, it is beyond the power of the legislature to order its summary forfeiture to the state as a penalty or punishment for such use without giving its owner an opportunity for a hearing."

The principle of the Grieb case is recognized in the provision in the ordinances wherein confiscation and destruction are authorized.

The Legislature can prohibit only those uses of property which are hurtful to the public, and the inhibited use must be hurtful in a legal sense. State, ex rel. Monnett v. Buckeye Pipeline Co., 61 O. S., 520.

We do not hold that the ordinance is invalid because it characterizes as a nuisance the operation of a machine, therein described, "which tends to encourage gambling". It is the method of making determination of this essential of a nuisance as a basis of a seizure of the machine which we cannot support.

There is no authority in the statutory law for the seizure of the machines here under consideration upon the averments of the petition, other than as incident to conviction. R. C. 2915.15 (13066), R. C. 2915.16 (13066-1), R. C. 2915.17 (13066-2). It follows that the right of the defendant officers to seize the machines, if it exists, must be grounded upon the authority of the ordinance.

It is not necessary to decide the issues of the constitutionality of the ordinances except insofar as is required to determine if upon any theory the sustaining of the motion for judgment on the pleadings was proper. Village of Strongville v. McPhee, 142 O. S. 534; American Cancer Society, Inc., v. Dayton, 160 O. S. 114. Even with this limitation we are required to pass upon the provision of the section of the ordinance under consideration, that the registration of a score by the machine constitutes its operation as a nuisance and authorizing seizure if its operation tends to encourage gambling.

We are committed to the opinion that to grant to police officers, or the City Auditor, as in Section 35.33, Ordinance No. 156-53 the power of determining that the operation of the machine here involved "tends to encourage gambling" is too broad and is a judicial power which cannot be delegated to enforcing or licensing officials. Likewise,

that in the operation of a machine the mere registration of a score may not be declared to be an element of gambling. State, ex rel. Dana v. Gerber, 79 O. App., 1; Stanto v. Tax Commission, et al., 114 O. S., 658, 673. We recognize that this was a civil action but the principles announced have application here. The mere possession of articles which are not gambling devices per se or which are not used for gambling and which the possessor has no intention of using for or in connection with gambling purposes may not be seized.

We consider some Ohio cases pertinent to the question of what constitutes gambling or gambling devices. There are two Ohio cases in which one of the parties is named Krauss. The first, State v. Krauss, 114 O. S., 342; the second, Krauss v. City of Cleveland, et al., 135 O. S. 43. As we read them they both had under consideration what was known as the "Morris" Slot Machine.

In the first case, Krauss had been arrested in a Justice of the Peace Court of a township in Hamilton County on a charge that he unlawfully kept and exhibited for gain a certain gambling device, commonly known as a slot machine, in violation of Section 13066, G. C. It appeared that the machine was operated with 5 cent coins and ejected candy mints and coupons. It also had a sign on it, "Operating this machine with anything but a U. S. 5 cent coin or making two or more consecutive purchases herein positively prohibited". The testimony was that the prosecuting witness had played the machine three consecutive times, that he received mints on each play, and that in addition on the second play he received checks. These checks were not presented for redemption in merchandise. The defendant was convicted. The Common Pleas and Appellate Courts reversed the judgment and the Supreme Court in a per curiam supported the reversal, saying that

until it appeared that the machine was consecutively played, "or some other manner of play, as a result of which premiums, checks, or coupons are received, which secure to the player something for nothing, as a result of his play, we fail to see how there can be a violation of the statute."

The second case was a taxpayer's suit seeking to declare an ordinance of the City of Cleveland invalid because it authorized licensing of gambling devices per se. The trial court granted the injunction. The Court of Appeals reversed. The case was certified to the Supreme Court and in a per curiam the court reversed the judgment of the Court of Appeals. This case, in our judgment, clearly overruled the pronouncement in the former Krauss case but it was not mentioned in the latter opinion. While the former Krauss case was the law this court followed it. Later, we followed the pronouncement of the second Krauss case.

It is vital to determine just what the second Krauss case held respecting amusement as a thing of value. It clearly appeared that the machines under consideration returned tokens as a matter of chance upon certain plays. The Court, speaking at page 46, says:

> "However, for a game to constitute gambling, it must be one which is played for gain or money or a thing of value as the prize or reward."
>
> "Amusement is a thing of value. Were it not so, it would not be commercialized. The less amusement one receives, the less value he receives, and the more amusement, the more value he receives."

The amusement which the court held to be violative of the applicable statutes is clearly set out at the bottom of page 46 and the top of page 47 of the opinion:

> "The minimum amount of amusement offered in each play is that which is offered without any return of

tokens. *Whatever amusement is offered through the return of tokens is added amusement which a player has an uncertain chance of receiving. This added amount of amusement, the procurement of which is dependent upon chance, is a thing of value.*" (Emphasis ours)

The petition here avers that the machine ejects no tokens or other memorandum and that it can be played for amusement only. There is no added amount of amusement which is the thing of value constituting the prize or reward essential to gambling.

The case of People v. Gravenhorst, 32 N. Y. Supp. (2d) 760, cited by appellee, quotes in part from the second Krauss opinion. This case in which the opinion is well written and extensive, resulting in the pronouncement of twenty-four headnotes, treats of a coin operated pin ball game. However, it is evident that the machine there under consideration was different in many material particulars from the machine described in the petition here. The court stated the question presented, "as to whether or not, from the facts adduced at the trial this court may properly infer that this machine is suited or fit for such illegal use as was contemplated by the statutes". It appeared that, in small print on certain plays the panel on the machine became illuminated and the word "Winner" appeared. That there were two ways in which the machine could be played and upon the second type the player would be declared a winner if he made prior correct selection of points that the machine would register. It further appeared that there was a slot in the machine that indicated the number of nickels the storekeeper paid to the winner and it was developed that such payments were regularly made to winners. The court held that although slugs or tokens were not actually ejected, the machine by

its other notations performed all the functions of such slugs or tokens. It also is stated that by means of insertion of plugs into the back of the machine it could be changed in its operation and made to show less winners and therefore return fewer nickels to the player. The court held that the only conclusion to be reached were the small numerals, the register and the 10 plugs are considered together, is that they form an intricate method or system by which the machine is adapted for use as a gambling device. Of course, there are many other observations in the opinion, some of which tend to support the position of appellees, but the question decided is that which we have indicated and the facts well support the judgment there entered.

The latest case and one worthy of careful consideration because the opinion was written by Judge Bell, formerly a member of our Supreme Court, is, In re Westerhaus Co., Inc., v. City of Cincinnati, appended to appellants' brief, and also reported in 68 O. L. A. 293. There were three questions presented in this case, the first, whether the machines in question, pinball machines, there considered, constituted gambling devices. Second, the constitutionality of an ordinance of the City of Cincinnati authorizing the seizure and destruction of pinball machines. Third, the right of the City Treasurer to refuse a license based upon violation of the ordinance, covering the operation of pinball machines without judicial determination as to such violation. The principal question was whether or not free-play of the machines constituted them as gambling devices per se. It was contended that the devices involved were gambling devices per se. A machine was in evidence and it was played and the operation thereof carefully considered. The court held that the play was not a game of chance but controlled by the skill of the player. This con-

clusion, of course, cannot be accepted without proof in this case. As we read the petition it does not aver that the machines here are operated by the skill of the player. It also appeared in the cited case that when the game was completed, if the player scores a sufficient number of points he may play one or more games without the insertion of additional coins. That operation is not in this case. Notwithstanding the free-play aspect of the machines, the court held that they were not gambling devices and granted the injunction. Judge Bell also cited, discusses and differentiates the case of Zellas v. Matowitz, 22 O. O. 261, and held that it had been overruled by Bradford v. Calhoun, 72 O. App. 333.

The judgment in Zellas v. Matowitz was based upon the premise of the immediate adaptability of the machine under consideration for gambling purposes. The principle is not involved in this case by the pleadings, although it might develop upon proof and become material as to the right of plaintiffs to any injunctive relief.

We have held in Columbus Legal Amusement Association v. Columbus, 50 O. L. A. 354, that,

> "The seizure and destruction of amusement devices, operated by coins or slugs, which may be readily converted into gambling devices, summarily and without process of judicial proceedings does not deprive any one affected thereby of the benefits of due process of law under either the Federal or State Constitution."

We base our conclusion in part upon the 13th syllabus of People v. One Pin Ball Machine (Ill.), 44 N. E. (2d) 950:

> "The right exists, summarily, and without process of judicial proceedings, to seize and destroy contraband articles and to seize articles not inherently illegal when illegally employed."

It has been an onerous task to digest the ordinances involved but upon the pleadings nothing else would have

answered the determinative errors assigned. We respectfully suggest that the ordinances could well be redrafted, simplified and shortened without affecting their cental purpose and to the advantage of the City and any one affected.

Issues are made by the pleadings as to the right of defendant officers to seize the machines described in the petition, to confiscate them, or to arrest the merchant operators and as to their threats so to do which required the taking of testimony before the issues could be resolved for or against either party. The court erred in sustaining the motion for judgment on the pleadings and in dissolving the temporary injunction.

Judgment reversed and cause remanded.

Wiseman, P. J., Miller and Hornbeck, JJ., concur.

APPENDIX B

Court of Common Pleas, Franklin County, Ohio.

No. 191975—Ray M. Benjamin, et al., Plaintiffs, vs. The City of Columbus, et al., Defendants.

Decision of the Court of Common Pleas

(Rendered this 9th day of May, 1956.)

Reynolds, J.:

In this case plaintiffs seek to enjoin defendants from enforcing the provisions of Ordinance No. 1615-54, which makes it unlawful for any person to have a device commonly known as a pinball game or machine in his possession or in his custody or under his control.

Each of the several plaintiffs is the owner of a number of pinball machines, which are placed in business establishments under a contract whereby the owners and merchants divide the revenue derived from their operation.

Judge Gessaman of this court granted a temporary restraining order against the enforcement of the ordinance in question, and the case is now before the court to determine whether that order should be made permanent or dissolved.

There are a number of different kinds of pinball machines involved but the principle and method of operation are the same. By the deposit of a coin a player receives the right to make a certain number of plays, always the same number. The play consists in propelling the balls by means of a plunger operated by the player and the balls in passing over the face or surface of the machine, come in contact or may come in contact with various obstacles and contacts with certain of these obstacles result in the recording of a score.

The object of the play is to see how high a score can be made, but supposedly the play is for amusement only since, unless a machine is especially equipped to reward the player with a free play or plays, dependent upon the score made, or the owner or custodian awards prizes for certain scores, the player receives nothing other than the satisfaction derived from the score made which is largely dependent upon chance, but somewhat on the skill and experience of the player.

In times past pinball machines were in the main designed and used as gambling devices, players being rewarded with coins, tokens redeemable in merchandise, money, etc., dependent primarily on chance. Such machines or devices were violative of the State statutes prohibitive of gambling.

Revised Code Sections 2915.01 to 2915.17 are all statutes designed to prohibit gambling in Ohio. Section 2915.15 has specific application to gambling devices, and provides as follows:

> "No person shall keep or exhibit for gain or to win money or other property, a gambling table, or faro or

keno bank, or a gambling device or machine, other than as is defined in section 2915.10, 2915.12, and 2915.16 of the Revised Code, or keep or exhibit a billiard table for the purpose of gambling or allow it to be so used. Whoever violates this section shall be fined not less than fifty nor more than five hundred dollars and imprisonment not less than ten nor more than ninety days, and shall give security in the sum of five hundred dollars against further violation of this section for one year."

Section 2915.16 defines a gambling device as follows:

"(A) Any slot machine or any other machine or mechanical device, other than as is defined in sections 2915.10 and 2915.12 of the Revised Code, an essential part of which is a drum or reel with insignia thereon which when operated may deliver, as the result of an element of chance, any money, property, or other thing of value or by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money, property, or other thing of value.

"(B) Any machine or mechanical device, other than as is defined in sections 2915.10 and 2915.12 of the Revised Code, designed and manufactured to operate by means of insertion of a coin, token, or similar object so that when operated it may deliver as the result of the application of an element of chance, any money, property, or other thing of value; * * *"

From the above statutory definition, it appears that the pinball machines here under consideration are not gambling devices since, when operated, they do not deliver as a result of chance any money, property or thing of value, nor may a person operating the same become entitled to receive as a result of chance any money or thing of value.

So far then, as the State statutes are concerned, these pinball machines are not violative of the law.

Back in 1936 the Police Department began to or threatened to confiscate all pinball machines and in the case of

Barok vs. City of Columbus, #148573, a permanent injunction was issued out of this court, prohibiting such confiscation, unless the machine or machines were actually being used for gambling.

In 1945 the Columbus City Council passed Ordinance 54-45 regulating pinball machines and providing that all such devices must be licensed by the city, and from that time until 1953 they were so operated under the regulatory and licensing provisions of that ordinance.

On March 19th, 1953, Council passed Ordinances Nos. 156-53 and 157-53. The purport of Sec. 156-53 is to provide for the seizure and destruction of any machine, device, instrument, apparatus or contrivance which tends to encourage gambling and may be used in a manner violative of the Code of the City of Columbus. Sec. 29-38 Ordinance 157-53 provides as follows:

> "It is hereby declared prejudicial to the public good, detrimental to the public morals and a nuisance, for any person to exhibit for the purpose of operating or to permit the operation of any machine, device or instrument in the City of Columbus, Ohio, of whatever kind or description, or by whatever name known or commonly referred to which tends to encourage gambling, or which registers odds or a score, or which is adapted, or may readily be converted into such machine, device or instrument that is adapted, for use in a manner violative of Sections 29.38-1, 29.40, 29.42, 29.42-1, and 29.42-2 of this chapter, and every machine so exhibited or permitted to be operated shall be subject to seizure, by any police officer of the city, and no such machine, device or instrument so seized by any police officer of the city, whether under the authority of this section or Section 29.39 or otherwise, shall be returned to the owner or person claiming the same except pursuant to an order of a court of competent jurisdiction."

Under these ordinances the City proposed to confiscate all pinball machines found in use in Columbus and suit was

brought in this court to enjoin such action, being the case of Ferguson et al. v. The City of Columbus, Case #187169.

The basis for the relief asked was similar to that in the instant case, namely that the ordinances were unconstitutional in that they (1) authorize seizure and confiscation of games without proof of their use for gambling purposes; (2) They impair the obligation of contract; (3) They take owners' property without due process of law; (4) are so vague, indefinite and uncertain as to constitute a denial of due process of law; (5) deny the owners equal protection of the law; and (6) constitute an unreasonable exercise of police power,—attempt to delegate judicial and/or legislative power.

All of these claims were denied in the answer, but a further allegation that the ordinances described amended former ordinances which permitted the registration and licensing of the games involved was admitted.

A temporary restraining order was granted and defendants filed an answer as above indicated, and then filed a motion for judgment on the pleadings, which motion was sustained by Judge Harter of this court.

On appeal to the Court of Appeals, this judgment was reversed on the grounds that the Court had erred in sustaining defendant's motion for judgment on the pleadings, in dissolving the temporary restraining order, and in entering final judgment in favor of defendants. The Court held that issues were raised by the pleadings which required a determination of facts by the Court from evidence addnced upon trial.

In commenting on Sec. 29.38 above quoted, the Court said:

> "This section permits the seizure of the machines if they register odds or a score without the qualifying language which is carried into the penalty section of Sec. 29-42-2. It also authorizes the seizure of the

machines if their operation 'tends to encourage gambling', another provision that is not carried into the other penalty provisions of the ordinances. The section further authorizes any police officer to make the seizure, that is to say, if a police officer determines that the machines 'tend to encourage gambling' he may seize them. This section of the ordinance not only sets out the essential requisites upon which seizure may be made, but incorporates the other sections of the ordinance and provides that if the machines come within any specific characterization of the section or are violative of any other named sections of the ordinances, they may be seized. * * * The provision for seizure, of Section 29-38 of the ordinance under consideration, is invoked upon the declaration that operations such as are therein defined, constitute a nuisance which may be abated. The City has wide police power in defining and declaring what shall constitute a nuisance. Insofar as the section authorizes seizure of machines that are gambling devices, per se, or operate in a manner described which is recognized as gambling, there is no doubt as to its validity, but:

'The mere declaration in an ordinance that is enacted to protect public safety, health or morals will not render it valid as being within the police power unless there is some reasonable relation between such purpose and the regulations prescribed,' —Youngstown vs. Kahn Bros., 112 O. S. 654.

* * * "The Legislature can prohibit only those uses of property which are hurtful to the public, and the inhibited use must be hurtful in a legal sense. * * * We do not hold that the ordinance is invalid because it characterizes as a nuisance the operation of a machine, therein described, 'which tends to encourage gambling'. It is the method of making determination of this essential of a nuisance as a basis of a seizure of the machine which we cannot support. There is no authority in statutory law for the seizure of the machines here under consideration upon the averments of the petition other than as an incident to conviction."

Thereafter to avoid the effect of this decision, Council passed Ordinance #1615.54, which, with the preamble, is as follows:

"To prohibit the possession of pin-ball and certain other similar machines; to supplement the Code of the City of Columbus, 1952, by the enactment of Section 29.69-1 thereof; and to declare an emergency.

Whereas, the operation of pin-ball machines and similar machines involving chance or skill or reward encourages gaming and the general disorder incident thereto, and is a threat or menace to the peace and morals of the community; and,

Whereas, even the so-called amusement-only pin-ball machines are so constructed as to be almost identical in appearance and operation to certain gambling devices, per se; and,

Whereas, even the vast majority of such so-called amusement-only devices are readily convertible to gambling devices; and,

Whereas, the operation of even amusement-only pin-ball machines has become and now constitutes a nuisance in that it encourages a false sense of values, idling, and loitering; and,

Whereas, an emergency exists in that such pin-ball machines are now generally absent from the city, but will return unless immediately prohibited; and for the immediate preservation of the public peace and safety; now, therefore,

Be it ordained by the council of the city of Columbus;

Section 1. That the Code of the City of Columbus, 1952, be and the same is hereby supplemented by the enactment of new Section 29.69-1 thereof, which said section shall read as follows:

'Section 29.69-1. Pinball machines, Prohibited. Whoever shall within the city have in his possession, or in his custody or under his control any table game or device commonly known as a "pin game," "pinball game," or "marble game," the operation, use or play of which is controlled by placing therein any coin, plate, disk, plug, key or other token, or by the payment of a fee, shall be guilty of a misdemeanor and

upon conviction shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both.'

Sec. 2. That for the reasons stated in the preamble hereto, this ordinance is hereby declared to be an emergency measure and shall take effect and be in force from and after its passage and approval by the mayor.

Passed December 6, 1954. O. J. Fillinger, President of Council.

Approved December 7, 1954. M. E. Sensenbrenzer, Mayor.

Attest: Agnes Brown Cain, City Clerk."

This ordinance makes it unlawful to possess or operate any pinball machine, irrespective as to whether it is being used for gambling purposes. The theory apparently being that since players may gamble on the outcome of games played, or the owner or operator might award prizes resultant on certain scores, in order to avoid any such possibility no pinball machines will be allowed to be owned or operated.

The evidence in this case fails to show that the operation of pinball machines for amusement only encourages gaming or disorder or is inimical to the peace and morals of the community. While it is true that the appearance generally of the pinball machines under consideration is similar to those used for gambling, the similarity stops with the appearance.

The essential difference is that they are not equipped or intended to be used as gambling devices, in that each player receives the same number of chances to play for a given deposit, and no one receives or is entitled to receive anything other than amusement or pleasure as the result of his play. They are not readily convertible to gambling devices, but such a change entails the services of a skilled

mechanic for an appreciable time, and all the evidence as to the machines in question is that they are not to be so converted.

The evidence fails to support the claim that the operation of these strictly amusement machines constitutes a nuisance, or that an emergency existed by reason of their operation or expected operation, and the conclusions set out in the preamble of the ordinance are not supported by the facts adduced in this case.

That pinball machines designed for gambling and used for that purpose have been rather common, in the past, did encourage gambling and constituted a nuisance, there can be little doubt, nor can there be any question but that either under city ordinances or state statutes such use may be and is prohibited. The question then remains as to whether the City has the authority to prohibit by ordinance the use and operations of pinball machines which are merely designed and utilized for amusement purposes.

Among the cases cited by defendants are two Georgia cases, one of which is Baker v. LaFayette, 44 S. E. 2nd, 255, in which a city ordinance was involved which in part reads as follows:

> "Section One. That from and after the 10th day of January, 1942, it shall be unlawful for any person, firm or corporation, to own, maintain, or operate any pinball machine, or similar machine, including all machines operated by depositing a coin therein for the playing of a game or engaging on any contest of chance or skill, including vending machines where the amount of merchandise to which the customer or person playing the machine is entitled, is uncertain, or may in some instances be a larger amount than in other instances."

The Court held that:

> "Pinball machines operated solely for pleasure * * * were within ordinance prohibiting ownership and

operation of pin ball machines operated by depositing a coin for playing a game or engaging in any contest of chance or skill."

In that case, however, the decision seems to have been decided on the basis of the authority contained in the Charter granted to the City of LaFayette, Section 29 of which was referred to in the decision as follows:

"Section 29 of the Charter of the City of LaFayette conferred authority upon the mayor and council to license, regulate and control * * * every keeper of a shooting gallery, nine pin, or ten pin alley, upon the keeper of any other table, stand or place for the performance of any game or play whether played with stick or ball, ring or other contrivance * * * and upon all establishments, business callings or avocations not hereinbefore mentioned, and which under the laws and constitution of the State of Georgia are subject to license."

In the opinion the Court said that:

"Under the Charter of the City of LaFayette, the mayor and council had authority to pass the ordinance in question."

The decision is short, the Court evidently concluding that the authority to control was authority to prohibit without any discussion on that point.

To the same effect is the case of Wallace v. Cartersville, 453 S. E. 2nd 63, which is another Georgia case and decided by the same Court, the first syllabus of which is as follows:

"Municipalities have authority under their charters to pass local ordinances prohibiting operation and maintenance of pinball machines within their corporate limits."

In the case of Ex parte Lawrence, 131 Pac. 2nd, 27, an ordinance of the City of Long Beach was involved, in which the Court held the ordinance "prohibiting maintenance and possession of pin games and other named games

in places of business or other places of public resort * * * is not "prohibitory" but "regulatory" only, and hence within the scope and purview of "police power".

In its opinion the Court said:

> "In the case now before us regulation, not prohibition is decreed by the ordinance. The games are proscribed only in places of business, or in any other 'place of public resort,' and exception is made of the amusement games described in another Long Beach ordinance. In other words 'pin ball' and other games denominated in the ordinance may be maintained at private houses or in certain delineated amusement zones, but not generally in places of business or public resort. The ordinance is not prohibitory, but regulatory only, and as such is unquestionably within the scope and purview of the police power."

To the same effect is the case of Sharpe v. Johnson, 185 Pac. 2nd, 340, in which the ordinance of the City of Laguna Beach involved prohibited maintenance of any table game, marble game or similar device in places of business or other public resort, and the Court again held that such ordinance was regulatory only and not prohibitory.

From a reading of these California decisions, one is impressed with the conclusion that had the ordinances been absolutely prohibitory, as the Columbus ordinance is, a different result would probably have been reached.

In the case of Kitt v. Chicago, 112 N. E. 2nd, 667, involved the question as to whether a certain game came within the meaning of a City Ordinance enacted pursuant to an enabling statute which granted authority to municipalities "To license, tax, regulate or prohibit pinball, or bowling alleys, billiard, bagatelle, pigeonhole, pool, or any other tables or implements kept for a similar purpose in any place of public resort."

Pursuant to this authority the Chicago City Council adopted an ordinance prohibiting bagatelle and pigeon-hole, and defined the meaning of those terms.

The Court simply held that an electric bowling game was not included within the definition of the proscribed games, and since the ordinance was restricted to those two games, the operation of an electric bowling game was not a violation of the ordinance.

In the case of Green v. Fifth Inning Base Ball Machine, 3 So. 2nd, 27, the Supreme Court of Alabama had under consideration a statute for the suppression of gambling devices and the Court held that the device called a fifth inning baseball machine, which was operated by placing a nickel in slots, which released certain balls and by ejecting balls on board by pulling a plunger and striking against the balls, which would then strike projections or bumpers on the board, a higher score resulting by striking certain numbers than by striking others, was a "game of chance" subject to condemnation as a "gambling device" under codal provisions relating to suppression of gambling devices, and thus whether the devices are used for gambling or players are offered inducement by way of prizes or other rewards. Among other things the Court said:

> "We think it clear enough from the language of this act, especially definition (d), that the law making body deemed it necessary to prohibit all such machines and devices which could be operated as a game of chance, regardless as to whether there was a 'pay off' or not, in order to fully repress the gambling evil. That this was within the police power of the state and violated no provision of the constitution, either State or Federal, is well demonstrated in the Eccles case, supra, as well as in our own case of State v. Murphy, 237 Ala. 332."

As before stated, this case involved a state statute which might well have more force and effect than a City Ordinance. The Court discussed a case in Arkansas as follows:

> "The Arkansas court in Stanley v. State, 194 Ark. 483, had for consideration this same character of machine, and the holding was that it was 'susceptible to use as a gambling device' and came within the condemnation of the statute. See also Steed v. State, 189 Ark. 389, where the observation was that such machines are gambling devices 'because the only reasonable and profitable use to which they may be put is use in a game of chance."

This observation is directly contrary to the evidence in this case which was that the use of the machines purely for amusement was quite profitable.

This decision is not helpful here in view of the statutory definition of a gambling device in this state which has heretofore been quoted.

In the case of Westerhaus Co. v. Cincinnati, 68 Abs. 293, there was under consideration a city ordinance which provided as follows:

> "It shall be unlawful for an exhibitor or other person to exhibit, operate or have in his possession a pinball machine which is so constructed as to make possible, either directly, or by use of an adjustment, the return of cash, tickets, discs or other tokens or certificates of any kind to a player operating the same, whether or not such tokens or certificates have a value of any kind or authorize further playing or other privileges. Only machines operated exclusively for the amusement provided by the operation shall be licensed."

The effect of the decision in that case was that possession or operation of a pinball machine was not a violation of the ordinance unless actually used for gambling purposes and the provision in the ordinance as to the possibility of use for gambling was not discussed.

In his opinion overruling defendants' demurrer to the petition, Judge Gessaman quoted from the case Frecker vs. Dayton, 88 O. A. 53, the third syllabus of which is as follows:

> "The police power granted to municipalities under Sec. 3, Article XVIII of the Ohio Constitution includes the power to 'regulate' but not the power to 'prohibit'. 'Regulation' does not include 'prohibition', unless the object of the legislative regulation is an inherently evil occupation, trade or business.
>
> "* * * Whether the machines in question are or create an inherently evil occupation, trade or business, cannot be determined on demurrer. It is a factual question which will be controlled by the evidence."

If used as gambling devices these machines or any machines would create an inherently evil trade or business, but used solely for amusement, which is the effect of the evidence in this case, it is difficult to conclude that they constitute a nuisance or create an inherently evil business.

The ordinances in question being absolutely prohibitory are beyond the authority of council to enact. As drawn the ordinances, if valid, would preclude the possession of a pinball machine in a private home, solely for the amusement of the owner, his family and friends, and this Court is of the opinion that council has no authority to enact such prohibitory legislation.

It might be suggested that the evil consequence on the use of pinball machines for amusement, if such evil exists, could easily be corrected by patterning an ordinance after those of Long Beach and Laguna Beach in which possession and operation in business or public places be prohibited. This, as pointed out in the California cases, would be "regulation" and not "prohibition" as provided in the present ordinances.

Concluding then that the ordinances under consideration are prohibitory rather than regulatory, and therefore be-

yond the power of council under the constitution to enact, the motion to dissolve the restraining order is overruled and the order made permanent. An entry may be prepared accordingly.

APPENDIX C

No. 5529—Ray M. Benjamin, et al., Appellees, v. City of Columbus, et al., Appellants.

No. 5530—G. D. Ferguson, et al., Appellees, v. City of Columbus, et al., Appellants.

Opinion of the Court of Appeals

(Rendered on February 7, 1957.)

Fess, J., of the Sixth District, sitting by designation.

Appeals on questions of law and fact from a judgment entered in Ferguson v. Columbus, #187,169 in the Common Pleas Court, permanently enjoining the defendant from the enforcement of Ordinances numbered 156-53, 157-53 and 1615-54. Benjamin v. Columbus, #191,975, was consolidated with the Ferguson case in the trial court and upon the appeals, the two cases are consolidated herein for retrial. The Ferguson case attacks the constitutionality of Ordinances 156-53 and 157-53, whereas the Benjamin cases relates to Ordinance 1615-54. By stipulation, it is agreed that each action includes the three Ordinances in question.

A digest of the averments of the petition as well as the salient provisions of the 1953 ordinances are reported in Ferguson v. Columbus, 70 Abs., 277, and are not repeated herein. The answer in the Ferguson case admits that the city threatened to enforce the provisions of the ordinances against plaintiffs and merchants with whom plaintiffs have contracts.

On July 19, 1954, the Common Pleas Court, based upon a well-considered opinion, in which it concluded that the 1953 ordinances were not violative of constitutional provisions, entered judgment for the defendant upon the pleadings. Upon an appeal on questions of law, this judgment was reversed, essentially on the ground that issues of fact were presented upon the pleadings that required a trial. Ferguson v. Columbus, 70 Abs., 277. In its opinion, the Court of Appeals made certain suggestions with respect to the licensing and seizure provisions of the 1953 ordinances, which are carried in the headnotes of its opinion.[1]

In its opinion, the Court of Appeals concludes "that the ordinances, given full force and effect, if the averments of the petition are proven, do not authorize, nor purport to empower, the defendant officers with the right to confiscate the machines, or to arrest and imprison the merchants with whom plaintiffs have contracts". The court also says that "it is not necessary to decide the issues of the constitutionality of the ordinances except in so far as is required to determine if, upon any theory, the sustaining of the motion for judgment on the pleadings was proper", and that "we do not hold the ordinance is invalid because it characterizes as a nuisance the operation of a machine therein described 'which tends to encourage gambling'. It is the method of making determination of this essential of a nuisance as a basis of a seizure of the machine which we cannot support".

After the Court of Appeals decision in the Ferguson case was announced, the defendant, no doubt as a result of such decision, enacted Ordinance 1615-54 on December 7, 1954. This ordinance provides that whoever shall have in

[1] We are advised that the headnotes of the opinion of the Second District Court of Appeals appearing in the Ohio Law Abstract were neither prepared nor approved by the Court.

his possession, custody or control any table game or device commonly known as "pin game", "pin-ball game" or "marble game", the operation, use or play of which is controlled by placing therein any coin, plate, disk, plug, key or other token, or by the payment of a fee, shall be guilty of a misdemeanor, etc. The purpose of this supplementary ordinance is rather ineptly stated in the preamble.[2]

These ordinances tacked onto the chapter of the Columbus Code relating to gambling, are complex, contradictory, and bear the mark of having been hastily drawn and considered without that degree of care and clarity of expression which should attend legislative enactments. We concur in the suggestions made in the Ferguson case, 70 Abs., at p. 288, that the ordinances should be shortened and codified into simple, concise and clear phraseology.

In March, 1955, the Benjamin case was filed, attacking the 1954 ordinance. On May 9, 1956, the Common Pleas Court found that a municipality has no authority to prohibit the use and operation of pinball machines which are merely designed and utilized for amusement purposes only. 73 Abs., 143. A decree was entered permanently enjoining the defendant from interfering with the ownership, etc.,

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(2) "Whereas, the operation of pinball machines and similar machines involving chance or skill or reward encourages gaming and the general disorder incident thereto, and is a threat or menace to the peace and morals of the community, and

Whereas, even the so-called amusement-only pinball machines are so constructed as to be almost identical in appearance and operation to certain gambling devices per se; and

Whereas, even the vast majority of such so-called amusement-only devices are readily convertible to gambling devices; and

Whereas, the operation of even amusement-only pinball machines has become and now constitutes a nuisance in that it encourages a false sense of values, idling, and loitering; and

Whereas, an emergency exists in that such pinball machines are now generally absent from the city, but will return unless immediately prohibited; and for the immediate preservation of the public peace and safety; now, therefore:" etc.

of pin games by the plaintiffs and any merchant with whom plaintiffs have contracts for the operation of such games so long as they are not used for gambling.[3]

A century ago an eminent jurist declared that an application for injunction is addressed to the sound discretion of the court. Spencer, J., in Commercial Bank v. Bowman (1855), 1 Handy, 246. This discretion reposed in a court of equity is to be exercised in the light of all circumstances surrounding the application for relief by way of the injunctive process.

The council of Columbus, in the exercise of its legislative function pursuant to its inherent police power and as conferred upon it by the Ohio Constitution, has declared that pin games (not gaming devices per se) are detrimental to public morals in that they tend to encourage gambling, register odds or a score, or are adapted, or may be readily converted into a machine, device or instrument that is adapted for use in violation of other provisions of the chapter relating to gambling.[4]

The ordinance also characterizes the operation of such a machine a nuisance. We are aware that the Supreme Court of Ohio has said that the mere declaration in an ordinance that it is enacted to protect public safety, health or morals will not render it valid under the police powers. Youngstown v. Kahn Bros. Bldg Co., 112 Ohio St., 654. And if a municipal ordinance has no reasonable relation to the morals, health and safety of the people of a municipality, it is an unauthorized exercise of the police power. Youngstown v. Kahn Bros., etc., supra; 37 Amer. Juris., 927.

But the ordinances in the instant case not only contain a general declaration that pin games are detrimental to

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[3] Although Westerhaus Co., Inc., v. Cincinnati, 165 Ohio St., 327, was not announced until June 11, 1956, free-play machines are excluded from the injunction.

[4] See 70 Abs., p. 284, wherein #29.38 is quoted in full.

public morals, but also the specific grounds which in the opinion of the legislative body makes such games detrimental. Council may have recognized the ancient adages that "a foles bolt is soone shotte", (Taverner, 1539) and "a fool and his money is soon parted", (Howell, 1645). Council in its wisdom may have concluded that mechanical whirr accompanied by the glitter of the flickering lights engendered by the erratic peregrination of the metallic balls recording mounting scores appeal to the gambling instinct and cupidity of the "moronic wastrels" who may play the machines for amusement only. Council has concluded that there are devices in addition to "one-arm bandits" which entice the gullible to gleefully fiddle away their time and substance in parting with their nickels and dimes.

An ordinance of a municipality can not be overthrown by a court unless such legislation is clearly arbitrary, unreasonable or unrelated to the public health, morals, safety, or welfare of the community. It is not for the courts to determine the wisdom of the legislation, but its constitutional validity, and a court may not substitute its judgment for that of the legislative body as to the necessity for or wisdom of the legislation. Stary v. Brooklyn, 162 Ohio St., 120, 134. Furthermore, a court will not substitute its judgment for the discretion of municipal legislative authorities, who are presumed to be familiar with the local needs and conditions, so long as the provisions do not clearly transcend the limits of reasonableness. 28 Ohio Juris., 498.[5]

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[5] "The proposition is well established that ordinances of a municipality must not be unreasonable or arbitrary; but it is equally well-settled that courts should not substitute their judgment for the legislative discretion and do not pass upon the wisdom or expediency of an ordinance." Dayton v. Kreske Co., 114 O. S., 624, 629, citing Allion v. Toledo, 99 O. S., 416.

Over objection, parties plaintiff engaged in the leasing of pin games, testified that their non-free play machines were operated for amusement only and did not tend to encourage gambling or loitering. This opinion evidence, given by witnesses interested in the outcome of the litigation, does not meet, much less overcome, the legislative declaration, presumptively true, that such machines tend to encourage gambling and loitering. These interested witnesses also testified that it would take up to four or five days for an expert mechanic to convert a machine to free play.[6]

There is also evidence that the conversion can be made in a much shorter period. But, accepting the exaggerated period at face value, we cannot hold that the council was wrong in declaring that such machines are readily convertible. A presumption of legality and good faith attends the adoption of an ordinance until it be clearly established that the council has exceeded its powers, or that it acted in bad faith, or has abused its discretion. 28 Ohio Juris. 501. Although we might agree with the opinion expressed by the operators and disagree with that of the council, we may not substitute our opinion for that of the legislative body.

Incident to obtaining the relief herein sought, the plaintiffs are also confronted with another insurmountable presumption. The cardinal rule in the interpretation of ordinances is to ascertain, declare and give effect to the legislative intent, which is to be gathered from the provisions of the enactment and the apparent purpose of the

[6] It is of some significance that these witnesses were unfamiliar with the interior mechanism of the machines and that the plaintiffs did not elect to introduce the testimony of expert mechanics who must have been available, regarding the manner of conversion and the time and skill required.

law as applied to the evil at which it is aimed. Toledo v. Wagner, 57 Ohio App., 160. It is repeatedly held in Ohio that a clear incompatibility between a law and the Constitution must exist before the judiciary is justified in holding the law unconstitutional, and the party asserting unconstitutionality must clearly show it. 10 Ohio Juris. 2nd, p. 248. A legislative function will not be interfered with by the courts unless such power is exercised in an arbitrary or unreasonable manner in violation of constitutional guaranties, and the facts to justify interference with the sound discretion of the legislative body must clearly appear from the evidence, and, if debatable, the legislation will be upheld. Cleveland Trust Co. v. Brooklyn, 92 Ohio App., 351.

Plaintiffs seek to draw a distinction between the power of a municipality to "prohibit" and its power to "regulate", as provided in #3, Art. XVIII of the Constitution. They apparently concede that the power to regulate includes the power to prohibit that which is inherently evil, but contend that the power to regulate does not include the power to prohibit that which is not inherently evil or is legitimate. 10 Ohio Juris. 2nd, 506. If a business is not harmful, the prosecution of it can not be lawfully prohibited to one who will conduct such business in a lawful manner. Thus it has been held that the following businesses do not bear such a relation to the public health, welfare, safety, or morals as to justify their restrictive regulation: commercial photographing, selling flowers, watchmaking, and painting, paperhanging, plastering and mason work (10 Ohio Juris. 2nd, 504); also slaughtering of chickens (Simon v. Cleveland Heights, 46 Ohio App., 234); street sales of ice cream, soft drinks, candies, etc. (Frecker v. Dayton, 153 Ohio St., 14; Frecker v. Zanesville (CP) 35 O. Ops. 234; Schul v. King (CP) 35 O. Ops.

238); trafficking in amusement tickets (Heller v. Cleveland (CP) 25 O. Ops. 106); and weighing and measuring (Cincinnati v. Broadwell, 3 O. Dec. Repr. 286). Cf. 10 Ohio Juris. 2nd, 507. But these authorities do not go to the extent of holding that a municipality may not prohibit that which has evil potentialities, such as is declared under the ordinances in question. Cf. Myers v. Cincinnati, 128 Ohio St., 235, 238.[7]

Furthermore, that which is legitimate may be prohibited incidental to the regulation of an evil. For example: ninety-nine percent of uninspected meat may be perfectly wholesome and its sale legitimate, but in the interest of protecting the consuming public from the one percent which may be unwholesome and deleterious, the sale of wholesome uninspected meat may be prohibited. Dayton v. Jacobs, 120 Ohio St., 225; Cf. Cleveland v. Terrill, 149 Ohio St., 532; Grown v. Cleveland, 125 Ohio St., 455 (sale of corn sugar). As stated in the Grown case, drastic regulations of private business have been repeatedly held to be constitutional, citing Marmet v. State, 45 Ohio St., 63; Phillips v. State, 77 Ohio St., 214; Sanning v. Cincinnati, 81 Ohio St., 142;

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(7) "The constitutional provisions relied upon by plaintiff in error protect the citizen in his right to pursue any lawful business, but they do not prohibit legislation intended to control pursuits which because of their nature have injurious and harmful possibilities. Even if the slot machine involved in this case is manufactured and intended for lawful operation, its potentiality and design is such that it may be easily put to lawful use. The regulation or prohibition of such a mechanism need not be postponed until such event occurs."

"The city has the right to determine whether the exhibition, maintenance and operation of slot machines as defined in the ordinance are prejudicial to the public good." Myers v. Cincinnati, supra.

As in the instant case, the defendant contended that the particular slot machine was for amusement only. The statement of facts indicates that the machine was used for gambling but the import of the decision is that even though it be used for amusement only, the city could prohibit it on account of its potentiality. (End of footnote)

Renner Brewing Co. v. Rolland, 96 Ohio St., 432; State v. Norval Hotel Co., 103 Ohio St., 361; Holsman v. Thomas, 112 Ohio St., 397; Dunn v. State, 122 Ohio St., 431. See also dissenting opinion of Tatt, J., in Frecker v. Dayton, 153 Ohio St., 14, 23. It is readily observed that incident to the exercise of the power to regulate, otherwise legitimate activities which do not comply with the regulations may be prohibited.

There is a clear cut distinction between that class of articles which have been declared unlawful and a public nuisance by statute or by ordinance and may be seized and disposed of forthwith and the class of property which is lawful in its ordinary and proper use and becomes contraband only when used in an unlawful manner and where there is determination to that effect in a court of competent jurisdiction. Grieb v. Dept. of Liquor Control, 153 Ohio St., 77, 81, citing Wagner v. Upshur, 95 Md. 519, 52 A. 509; Edson v. Crangle, 62 Ohio St., 49, 56 N. E. 647; State v. French, 71 Ohio St., 186, 202, 73 N. E. 216; In re Estate of Weisenberg, 147 Ohio St., 152, 70 N. E. 2nd, 269. There is likewise a distinction between a pin-ball game which has been declared unlawful and a nuisance and the so-called "fish net" cases referred to in the Grieb case.

Notwithstanding the constitutional safeguard of religious freedom, conduct of business pursuits, including sports, may be validly prohibited on Sunday.[8]

Since regulation, as the term is used in the Constitution, includes prohibition, in order to grant relief we must find

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[8] "The prohibition of secular business on Sunday is advocated on the ground that by it the general welfare is advanced, labor protected, and the moral and physical well-being of society promoted. The legislature has so considered it, and the judiciary cannot say that the legislature was mistaken, and, therefore, the act is unconstitutional, without passing out of its legitimate sphere, and assuming a right to supervise the exercise of legislative discretion in matters of mere expediency." State v. Powell, 58 Ohio St., 324, 345.

that the prohibitory regulation herein involved has no reasonable relationship to the public morals or public welfare. It is to be borne in mind that the burden is not upon the city to sustain the constitutionality, but the burden is on the plaintiff to clearly show that enactments are unconstitutional. It is our conclusion that the plaintiffs have failed to show that such prohibitory regulations are unreasonable and arbitrary or that they have no real or substantial relation to the morals or general welfare of the people of Columbus.

In its opinion in Ferguson v. Columbus (1954), 70 Abs., 277, the court, without being required to do so, said that the power granted in the 1953 ordinance to police officers and licensing officials to determine that the operation of a pinball machine "tends to encourage" gambling is too broad and is a judicial power which cannot be delegated to enforcing or licensing officials. In our opinion this invalidity has now been removed by the enactment of Ordinance 1615-54, prescribing a standard for licensing and seizure of pinball machines, which the council has declared tend to encourage gambling, register odds or scores, and are readily convertible to free play. Admittedly this conclusion is debatable, but the doubt must be resolved in favor of constitutional validity. As a general rule, a law which confers discretion on an executive officer or board, without establishing any standards for guidance, is a delegation of legislative power and unconstitutional; but when the discretion to be exercised relates to a police regulation for the protection of the public morals, welfare, safety or general welfare, and it is impossible or impracticable to provide such standards, and to do so would defeat the legislative object sought to be accomplished, the legislation conferring such jurisdiction may be valid and constitutional without such restrictions

or limitations. 7th Par. Syllabus in Matx v. Curtis Cartage Co., 132 O. S., 271.

In the light of the foregoing observations, the ordinances are not in violation of the Fourteenth Amendment. Murphy v. California, 225 U. S., 623.

In conclusion, plaintiffs in each case have failed to show:

1. A clear incompatibility between the ordinances and the Ohio Constitution.

2. That the ordinances bear no real and substantial relation to the public health, safety, morals or general welfare of the public, or are arbitrary or unreasonable.

3. That plaintiffs are entitled to injunctive relief.

The petition in each case should be dismissed at plaintiff's costs. Judgment for defendant in each case and causes remanded to the Common Pleas Court for execution for costs. See journal entry to be submitted to Hunsicker, P. J., for approval.

Deeds, J., of the Sixth District, and Hunsicker, J., of the Ninth District, sitting by designation, concur.

APPENDIX D

Opinion of the Supreme Court of Ohio

No. 35179—Ray M. Benjamin, et al., v. City of Columbus, et al.

No. 35180—G. D. Ferguson, et al., v. City of Columbus, et al.

Decided December 18, 1957

1. Where all the proposed uses of certain pin-game machines by their owners will necessarily violate the law as set forth in valid municipal ordinances, the petitions of such owners seeking equitable relief to protect those machines and seeking declaratory judgments setting forth their rights and duties with respect to them will be dis-

missed. (Paragraph four of the syllabus of Westerhaus v. City of Cincinnati, 165 Ohio St., 327, approved and followed.)

2. The "powers of local self-government" conferred upon municipalities by Section 3 of Article XVIII of the Constitution include the power to enact local legislation, except to the extent that limitations upon that legislative power have been set forth in the Constitution.

3. The words appearing in Section 3 of Article XVIII of the Constitution after the word "self-government" represent not a grant of legislative power but a limitation upon the legislative power granted by the words up to and including the word "self-government."

4. A municipal ordinance enacted pursuant to the police power of the municipality cannot be considered invalid merely because it prohibits instead of regulates. (Frecker v. City of Dayton, 153 Ohio St., 14, distinguished.)

5. Although almost every exercise of the police power will necessarily either interfere with the enjoyment of liberty or the acquisition, possession and production of property, within the meaning of Section 1 of Article I of the Ohio Constitution, or involve an injury to a person within the meaning of Section 16 of Article I of that Constitution, or deprive a person of property within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States, an exercise of the police power having such an effect will be valid if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary.

6. Whether an exercise of the police power does bear a real and substantial relation to the public health, safety, morals or general welfare of the public and whether it is unreasonable or arbitrary are questions which are com

mitted in the first instance to the judgment and discretion of the legislative body, and, unless the decisions of such legislative body on those questions appear to be clearly erroneous, the courts will not invalidate them.

7. Where an amusement device is so designed that it may readily be put to an unlawful use in gambling, a municipality may, in the exercise of its police power, prohibit the exhibition of such machine and need not postpone such action until such machine is unlawfully used. (Myers v. City of Cincinnati, 128 Ohio St., 235, followed.)

8. A machine or other device is not a game within the ordinary meaning of the word "game" if it does not enable someone to determine whether he has, by his efforts in playing it, either made some score or achieved or not achieved some other objective.

9. A municipality may by ordinance make it a misdemeanor to possess within the municipality any pin game, the operation, use or play of which is controlled by placing therein any coin, although operation of such machine will not give a player any prize even by way of free plays or anything in return for his payment other than amusement in playing such game.

10. The provisions of the state and federal Constitutions, inhibiting laws impairing the obligation of contract, cannot affect the police power.

11. If the police power of a municipality includes the power to make possession within the municipality of a certain kind of property unlawful, the exercise of that police power to make such possession unlawful will not be impaired by the fact that owners of such property have theretofore made binding contracts relative to its use within the municipality.

These two actions for declaratory judgment and injunction were heard together by the Common Pleas Court of

Franklin County under a stipulation that any evidence competent in one case should be competent in the other, and that the validity of three ordinances of the city of Columbus should be treated as being involved in each case. The plaintiffs in both cases, herein referred to as plaintiffs, have for varying numbers of years owned and operated in Columbus varying numbers of pin-game machines having very substantial values.

The three ordinances, the validity of which are questioned and which are now incorporated in the Code of the City of Columbus, are ordinance No. 156-53, relative to licensing of mechanical amusement devices but containing some provisions relative to seizure of machines tending to encourage gambling, ordinance No. 157-53, relative to gambling but containing some provisions declaring as a nuisance the exhibition for the purpose of operation of machines merely tending to encourage gambling and authorizing their seizure, and ordinance No. 1615-54 which reads so far as pertinent:

"Section 29.69-1. * * * Whoever shall within the city have in his possession, or in his custody or under his control any table game or device commonly known as a 'pin game,' 'pin-ball game,' or 'marble game,' the operation, use or play of which is controlled by placing therein any coin, plate, disk, plug, key or other token, or by the payment of a fee, shall be guilty of a misdemeanor * * *."

In the preamble to the ordinance enacting that section of the Code of the City of Columbus, it is stated in part:

"Whereas, the operation of pin-ball machines and similar machines involving chance or skill or reward encourages gaming and the general disorder incident thereto, and is a threat or menace to the peace and morals of the community; and,

"Whereas, even the so-called amusement-only pin-ball machines are so constructed as to be almost identical in appearance and operation to certain gambling devices, per se; and

"Whereas, even the vast majority of such so-called amusement-only devices are readily convertible to gambling devices; and,

"Whereas, the operation of even amusement-only pin-ball machines has become and now constitutes a nuisance in that it encourages a false sens of values, idling, and loitering * * *".

This latter ordinance was enacted in December 1954, immediately after the Court of Appeals in Ferguson v. City of Columbus, 70 Ohio Law Abs., 277, 128 N. E. (2d), 198, had cast doubt upon the effectiveness of the two earlier ordinances in discouraging the ownership or exhibition of machines which, although not gambling devices per se or shown to have been used for gambling, were adapted for gambling, might readily be converted to be so adapted, or registered odds or a score.

The Common Pleas Court determined that all these ordinances are "invalid, unconstitutional and void, insofar as they prohibit the ownership, possession, custody, control and operation of pin games for amusement purposes only" and decreed that defendants should be enjoined from interfering under these ordinances "with the ownership, possession, custody, control and operation of said pin games by * * * plaintiffs * * * as well as interfering with or molesting any merchant with whom said plaintiffs have either heretofore had, or may now or hereafter have, contracts for the operation of said games, so long as said games are not used for gambling." Benjamin v. City of Columbus, 73 Ohio Law Abs., 143, 136 N. E. (2d), 641.

On appeal to the Court of Appeals on questions of law and fact, that court determined that the three ordinances are valid and that plaintiffs are "not entitled to an injunction restraining the enforcement of said ordinances" and dismissed the petitions.

These two causes are now before this court on appeal from the judgments of the Court of Appeals, both as appeals involving constitutional questions and pursuant to allowances of motions to certify the records.

Opinion

Taft, Judge:

In order to avoid the effect of this court's decision in Westerhaus v. City of Cincinnati, 165 Ohio St., 327, 135 N. E. (2d), 318, plaintiffs have emphasized the fact that the machines involved in the instant case are not equipped so as to provide for and are not to be used to provide free plays. However, besides deciding that free-play machines are gambling devices, we also decided in the Westerhaus case that, since the proposed use of the machines there involved would violate certain state statutes, a petition of the owner of the machines "seeking equitable relief to protect such machines and seeking a declaratory judgment setting forth the rights and duties of such owner with respect to such machines, will be dismissed." (Paragraph four of syllabus.) In the opinion at page 335, it was pointed out that "if * * * each of the * * * machines * * * is * * * a 'gambling device or machine,' then the" trial court "would have been encouraging violations of" the law "if it had given plaintiff any relief with regard to those machines, and its judgment in dismissing the petition must be affirmed." If all the proposed uses by plaintiffs of the machines involved in the instant cases will necessarily violate the law, then their petitions, seeking equitable re-

lief to protect those machines and seeking declaratory judgments setting forth their rights and duties with respect to such machines, should be dismissed. Even though the law violated may be set forth in municipal ordinances instead of in state statutes, the same principle must be applied.

As we view it therefore we are confronted at the outset with the question whether the proposed uses by plaintiffs of the machines involved in the instant cases will necessarily violate any valid provisions of the ordinances of Columbus.

We agree with the Court of Appeals that these ordinances appear to have "been hastily drawn and considered without that degree of care and clarity of expression which should attend legislative enactments." However, although complaint is made with respect to the vagueness, indefiniteness and uncertainty of some parts of these three ordinances, no such complaint is made with regard to the provisions of section 29.69-1, hereinafter referred to as the 1954 ordinance, which makes it a *misdemeanor to possess within the city or to control a "pin game* * * *" the operation, use or play of which is *controlled by placing therein any coin.*" The allegations of plaintiffs' petitions either are or necessarily indicate that plaintiffs' business is the ownership, exhibition and rental to others for exhibition and use *in Columbus* of just such pin games. It is apparent therefore that plaintiffs neither contemplate nor suggest any possession in Columbus by anyone of the machines involved in the instant cases that will not necessarily amount to what is specified as a misdemeanor by that ordinance. Hence, unless plaintiffs can establish the invalidity of that ordinance, their petitions must be dismissed.

Plaintiffs argue that, since the pin-game machines in the instant cases are to be used for amusement only, their

operation constitutes a legitimate business; and that such a business cannot be prohibited. Such an argument, in effect, begs the question. Obviously, to the extent that acts in carrying on a business do not violate valid prohibitions of statutes and ordinances, it is a legitimate and lawful business. To the extent that those acts do violate such prohibitions, the business is neither legitimate nor lawful. If the carrying on of that business involves the doing of acts which are prohibited by the 1954 ordinance, then it is necessary to determine whether that ordinance is valid. It is not helpful, in determining that question, to jump to the conclusion that there is a right to do such acts and that, therefore, the ordinance prohibiting the doing of them is invalid.

Plaintiffs argue in effect that, although Columbus may have power to make regulations with respect to pin-game machines, it has no power to prohibit them.

Columbus contends that its power to enact the 1954 ordinance is derived from the provisions of Section 3 of Article XVIII of the Constitution, and plaintiffs contend that any such power can only be derived therefrom. That section reads:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

The "powers of local self-government" conferred upon municipalities by this constitutional provision include the power to enact local legislation, except to the extent that limitations upon that legislative power have been set forth in the Constitution. Obviously, one such limitation is that any "police, sanitary and other similar regulations" that are adopted may be enforced only "within" the munici-

pality's limits and cannot "conflict with general laws." However, the words appearing in Section 3 of Article XVIII of the Constitution after the word "self-government" represent not a grant of legislative power but a limitation on the legislative power granted by the words up to and including the word "self-government." Hence, if the state would have power to prohibit what the 1954 ordinance purports to prohibit within the limits of Columbus, then that ordinance cannot be considered invalid merely because it prohibits instead of regulates.

We recognize that the Court of Appeals for Montgomery County apparently based its decision in Frecker v. City of Dayton, 88 Ohio App., 52, 85 N. E. (2d), 419, upon the conclusion that the police power granted to municipalities by Section 3 of Article XVIII of the Constitution includes the power to regulate but not the power to prohibit. That conclusion was apparently based upon the premise that the police power of a municipality or its power to enact police reguations is derived from the portion of that constitutional provision appearing after the word "self-government." As hereinbefore pointed out that premise is incorrect. It may be observed that, although this court affirmed the judgment of the Court of Appeals in the Frecker case (153 Ohio St., 14, 90 N. E. (2d), 851), the majority opinion, in giving reasons for the affirmance, apparently did not approve the conclusion, expressed by the Court of Appeals, that the police power granted to municipalities includes only the power to regulate and not the power to prohibit; and the minority opinion expressly rejected that particular conclusion of the Court of Appeals, thereby at least indicating that this court unanimously failed to approve any such conclusion when it was urged to approve it.

The case of Bronson v. Oberlin, 41 Ohio St., 476, 53 Am. Rep., 90, relied upon by plaintiffs, was decided long before

adoption of Section 3 of Article XVIII of the Constitution and at a time when municipalities derived any legislative powers they might have from enactments of the General Assembly. Its distinction from the instant case is well demonstrated by the following language of the opinion by Nash, J., at page 482:

"Whether the Legislature could confer the power to prohibit * * * or whether the council by ordinance could prohibit what this power conferred, are questions not involved in this case. The question simply is, 'What power did this act confer?' We are of the opinion that it did not give authority to prohibit."

The case of Weber v. Board of Health, 148 Ohio St., 389, 74 N. E. (2d), 331, relied upon by plaintiffs, actually tends to support the conclusion that legislative power may include the power to prohibit a business not unlawful in itself. Thus it is said in paragraph three of the syllabus:

"* * * when such board (of health) passes a resolution which prohibits a business not unlawful in itself and which is susceptible to regulations * * * such board transcends its administrative rule-making power and exercises legislative functions * * *."

Plaintiffs argue that the 1954 ordinance is arbitrary and unreasonable and that it takes plaintiffs' property without due process of law.

Almost every exercise of the police power will necessarily either interfere with the enjoyment of liberty or the acquisition, possession and production of property, within the meaning of Section 1 of Article I of the Ohio Constitution, or involve an injury to a person within the meaning of Section 16 of Article I of that Constitution, or deprive a person of property within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States. Nevertheless, it is well settled

that an exercise of the police power having such an effect will be valid if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary. City of Piqua v. Zimmerlin, 35 Ohio St., 507, 511.

Whether an exercise of the police power does bear a real and substantial relation to the public health, safety, morals or general welfare of the public and whether it is unreasonable or arbitrary are questions which are committed in the first instance to the judgment and discretion of the legislative body, and, unless the decisions of such legislative body on those questions appear to be clearly erroneous, the courts will not invalidate them. State, ex rel., Standard Oil Co., v. Combs, Dir., 129 Ohio St., 251, 194 N. E., 875; City of Dayton v. S. S. Kresge Co., 114 Ohio St., 625, 151 N. E., 775, 53 A. L. R., 916; and City of Cleveland v. Terrill, 149 Ohio St., 532, 80 N. E. (2d), 115.

Myers v. City of Cincinnati, 128 Ohio St., 235, 190 N. E., 569, involved an ordinance which made it unlawful "to exhibit * * * any machine * * * which may be operated by the use of any coin, token * * * or disc * * * if said machine * * * when so operated * * * returns or distributes one or more coins, tokens * * * or discs." A machine which always returns one or always returns any other specific number of tokens would be described by the words of this ordinance. Such a machine obviously does not involve any element of chance, an essential element of gambling. Also, except for a possible inference which might be drawn from the portion of the opinion first quoted hereinafter, there is nothing in the report of the case to indicate that any element of chance was involved in playing this machine, i.e., a chance of getting *or not getting* tokens that would enable a replay.

In the opinion "by the court" it is said:

"Many recent decisions are to the effect that slot vending machines of the general type involved in this case, which in return for coins deposited therein dispense merchandise, accompanied at intervals by a varying number of checks or tokens which may be used either for obtaining additional merchandise or for securing additional amusement by continuing the operation of the machine, are gambling devices."

The report affirmatively indicates that the tokens received from this machine had no cash or trade value and that one who put a nickel in the machine always got a package of mints but that nothing but tokens came from the machine when replayed only with a token. Although tokens could be used "for securing additional amusement by continuing the operation of the machine," it does not appear whether the machine dispensed "at intervals * * * a varying number of tokens" or whether it simply dispensed on each occasion the same number of tokens. If the machine simply dispensed on each occasion the same number of tokens, then it would obviously not involve the element of chance, an essential element of gambling. See Westerhaus v. City of Cincinnati, supra (165 Ohio St., 327). That this may have been the fact is indicated by the remainder of the opinion reading, so far as pertinent:

"* * * our sole function is to decide whether the ordinance before us constitutes a valid exercise of police power on the part of the municipal authorities * * *.

"The constitutional provisions relied upon by plaintiff in error protect the citizen in his right to pursue any lawful business, but they do not prohibit legislation intended to control pursuits which because of their nature have injurious and harmful possibilities. Even if the slot machine involved in this case is manufactured and intended for lawful operation, its potentiality and design is such that it

may be easily put to unlawful use. (As by wagering on which or what combination of designs would appear on the stopping of each of the three wheels rotated in the playing of the machine.) The regulation or prohibition of such a mechanism need not be postponed until such event occurs * * *.

"* * *

"The city has the right to determine whether the exhibition, maintenance and operation of slot machines as defined in the ordinance are prejudicial to the public good * * *.

"Being of the opinion that the ordinance in question constitutes a valid exercise of police power and that the defendant was properly convicted under it, the judgment * * * is affirmed."

It is apparent that this court assumed in that case that the slot machine there involved was "manufactured and intended for lawful operation." However, this court unanimously held that a municipality might prohibit its exhibition because "its potentiality and design" were "such that it may be easily put to unlawful use"; and this court unanimously and specifically stated that "the * * * prohibition of such a mechanism need not be postponed until such event occurs." See also Zelles v. Matowitz, 139 Ohio St., 627, 41 N. E. (2d), 708 (trial court report in 22 Ohio Opinions, 261).

Such a conclusion is in full accord with decisions outside this state. Calcutt v. McGeachy, Sheriff (1937), 213 N. C., 1, 195 S. E., 49; Stanley v. State (1937), 194 Ark., 483, 107 S. W. (2d), 532; Woodward v. City of Lithonia (1940), 191 Ga., 234, 11 S. E. (2d), 476; Alexander v. Hunnicutt, Sheriff (1941), 196 S. C., 364, 13 S. E. (2d), 630; State, ex rel., Green, v. One 5¢ Fifth Inning Baseball Machine (1941), 241 Ala., 445, 3 So. (2d), 27. See Eccles v. Stone, Sheriff

(1938), 134 Fla., 113, 183 So., 628; Murphy v. People, 225 U. S., 621, 56 L. Ed., 1229, 32 S. Ct., 697, 41 L. R. A. (N. S.), 153; Ohio, ex rel., Clark, v. Deckebach, Aud., 274 U. S., 392, 71 L. Ed., 1115, 47 S. Ct., 630; 52 American Jurisprudence, 280, Section 34; 24 American Jurisprudence, 421, Section 34. Annotation, 148 A. L. R., 879, 895. But see also annotations, 132 A. L. R., 1004, 162 A. L. R., 1118.

If the reasoning of the court given in Stanley v. State, supra, as a basis for its decision were followed, we would be required to say in the instant cases that the machines described in the 1954 ordinance are "gambling devices per se because the only reasonable and profitable use to which they may be put is use in a game of chance." This is because a reading of the report of that case will readily lead to the conclusion that the machine there involved was much more of an amusement device than the machines described in the 1954 Columbus ordinance.

Although the allegations of plaintiffs' petitions disclose that their machines all register scores, it is conceivable that a pin game might be so designed as to register no score. However, it would not be a game within the ordinary meaning of the word "game", and hence would not be described by the words of the 1954 ordinance, if it did not enable someone to determine whether he had, by his efforts in playing it, either achieved or not achieved some objective. Hence, the pin game described in this ordinance will require payment of a price ("play * * * controlled by placing therein * * * coin") for the chance of achieving a score or some other objective. Even though no provision is made for the third essential element of gambling, i.e., a prize on achieving such score or other objective, it is apparent that the machine does furnish a ready means for two or more persons to gamble, by providing for such a prize on the achievement of some score or other objec-

tive of the game, and hence the game is readily adaptable to use for gambling purposes.

In determining whether the 1954 ordinance is reasonable and whether it has a substantial relationship to the health, morals, safety or general welfare of the people of Columbus, we must weigh the benefits to those people from the elimination of such devices against the benefits in having such devices available for use by those people and the interests of the plaintiffs as the owners of those devices. Cf. Curtiss v. City of Cleveland, 166 Ohio St., 509.

In doing so, we note at the outset that the ordinance does not purport to and could not make possession of the machines unlawful outside Columbus. Thus, plaintiffs can only be prevented from having them in Columbus. This may involve plaintiffs in some expense in moving the machines from Columbus and may prevent them from making money from their use in Columbus, but, if plaintiffs comply with the ordinance, they do not lose their machines and will have opportunities to make money from their use elsewhere.

It is true that these machines may be operated by members of the public without any gambling, but there will obviously be very little if any benefit from such operation to anyone, other than to the owner or exhibitor by reason of payments received for their use. Certainly, a legislative body could reasonably conclude that the amusement provided to operators of such machines, which is all they would get from their operation unless they were used as gambling devices, would contribute little if anything at all to the health, safety, morals or welfare of such operators or of the people of Columbus.

On the other hand, the potentialities for injury and harm to the health, morals, safety and welfare of the public from these machines may quite reasonably have been, as the

preamble to the 1954 ordinance indicates they were, regarded as very serious by the legislative body of Columbus.

In support of their contention that there are no such potentialities for such injury or harm, plaintiffs offered considerable evidence in an effort to establish that the games described by the 1954 ordinance do not tend to encourage gambling or loitering. With respect to a somewhat similar problem it was said in the opinion by Mr. Justice Lamar in Murphy v. People, supra (225 U. S., 623):

"That the keeping of a billiard hall has a harmful tendency is a fact requiring no proof, and incapable of being controverted by the testimony of the plaintiff that his business was lawfully conducted, free from gaming or anything that could affect the morality of the community or of his patrons. The fact that there had been no disorder or open violation of the law does not prevent the municipal authorities from taking legislative notice of the idleness or other evils which result from the maintenance of a resort where it is the business of one to stimulate others to play beyond what is proper for legitimate recreation."

Where it has clearly appeared that legislation enacted pursuant to the police power is unreasonable or arbitrary or has no real or substantial relation to the public health, safety, morals, or general welfare, this court has not hesitated to hold it invalid. See Olds v. Klotz, 131 Ohio St., 447, 3 N. E. (2d), 371 (holding invalid ordinance limiting and fixing hours per day during which grocery might be kept open); City of Cincinnati v. Correll, 141 Ohio St., 535, 49 N.E. (2d), 412 (holding invalid ordinance limiting and fixing hours during which barber shop may remain open); Grieb v. Department of Liquor Control, 153 Ohio St., 77, 90 N. E. (2d), 691 (holding invalid statutes providing for confiscation of alcoholic liquors lawfully acquired and owned by but found on premises of one whose permit

to sell had been revoked or cancelled). However, as to the 1954 ordinance involved in the instant case, it does not so appear.

In contending that the 1954 ordinance is arbitrary and unreasonable, plaintiffs further point out that its words would preclude the possession of a pin-game machine in a private home, solely for the amusement of the owner, his family and friends; and it is contended that a municipal legislative body has no authority to enact any such prohibitory legislation.

As the preamble to the 1954 ordinance indicates, possession of the pin games described therein was made unlawful because the legislative body had, among other things, determined that their "operation * * * encourages gaming and the general disorder incidental thereto * * * and * * * encourages a false sense of values, idling and loitering." It is obvious that the operation of a machine in a private home would encourage the same things. Thus, Section 2915.06, Revised Code, makes it a crime for any "person" to "play a game for money or other thing of value or make a wager" therefor; and a pin game such as described in the 1954 ordinance could obviously be very readily used in a private home as a means of violating that statute.

Also, if the owner of a private home really wants to keep such a machine in his home solely for the amusement of himself, his family and friends, he can do so without violating the 1954 ordinance by acquiring such a machine so modified that its operation is not, to use the words of the ordinance, "controlled by placing therein any coin, plate, disk, plug, key or other token, or by the payment of a fee." It could hardly be contended with reason that the amusement to the operator, which plaintiffs claim is harmless, is such "placing therein" or "payment".

If the 1954 ordinance made an exception for possession of these machines in private homes, such exception would obviously furnish a means of covering up illegal possessions of such machines. Also such machines could then rapidly be moved to and from such homes in order to keep them away from the activity of law-enforcement officers.

In our opinion, the breadth of this prohibition of possession of these machines, as specified in the 1954 ordinance, has a reasonable basis and could reasonably have been determined by the Columbus legislative body to have a real and substantial relationship to the health, morals, safety and welfare of the people of Columbus.

It may further be observed with respect to this contention that, in making it, plaintiffs are seeking a decision that the 1954 ordinance is invalid, not because it impairs any constitutional rights of plaintiffs but because it impairs the constitutional rights of others. It has sometimes been said that "one attacking the constitutionality of a statute is not the champion of any rights except his own." 11 American Jurisprudence, 752, Section 111.

Plaintiffs contend, in effect, that, since they have many outstanding contracts with others for the operation of these pin games in Columbus, an ordinace making it a misdemeanor to possess or control such games within Columbus will be invalid because it will impair the obligation of those contracts within the meaning of constitutional provisions.

It is well settled that the provisions of the state and federal Constitutions, inhibiting laws impairing the obligation of contract, cannot affect the police power. In other words, the exercise of the police power cannot be headed off by the making of contracts reaching into the future. State, ex rel. Crabbe, Atty. Genl., v. Massillon Savings & Loan Co., 110 Ohio St., 320, 143 N. E., 894; City of Akron v. Public Utilities Commission, 149 Ohio St., 347, 78 N. E.

(2d), 890. Thus, if the police power of a municipality includes the power to make possession within the municipality of a certain kind of property unlawful, the exercise of that police power to make such possession unlawful will not be impaired by the fact that owners of such property have theretofore made otherwise binding contracts relative to its use within the municipality.

Plaintiffs contend in effect that, if possession of the games described in the 1954 ordinance is to be made unlawful because of the possibility that they might be used for gambling, then all games having a similar possibility should likewise be treated as unlawful; and that otherwise there will be a clear denial of the equal protection of the law within the meaning of constitutional provisions.

It is true that people do gamble with checkers and cards and gamble on the outcome of games such as golf, tennis, football and baseball. However, it would seem that there is a real and substantial distinction between pin games of the kind described in the 1954 ordinance and those other games, which would justify the classification of such pin games separately from those other games.

We believe that this contention of plaintiffs is disposed of by the following statements from the syllabus in City of Xenia v. Schmidt, 101 Ohio St., 437, 130 N. E., 24:

"5. A classification must not be arbitrary, artificial, or evasive, but there must be a real and substantial distinction in the nature of the class or classes upon which the law operates.

"6. In respect to such distinctions, the legislative body has a wide discretion, and the legislation involving classification will not therefore be held invalid unless the classification attempted is clearly and obviously unreasonable to

the point of discriminating against members of the same class, so as to deny them the equal protection of the laws.

"* * *

"8. The guarantee of 'equal protection of the laws' under our Constitutions is fully complied with when the law operates equally upon each member of a constitutional class.

"9. A legislative body may direct its legislation against any evil as it actually exists, without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are not forbidden. (Yee Bow v. City of Cleveland et al., 99 Ohio St., 269, approved and followed.)"

Plaintiffs contend that the 1954 ordinance forbids what the statutes permit and therefore represents a regulation which is "in conflict with general laws" within the meaning of Section 3 of Article XVIII of the Constitution.

In support of this contention, it is pointed out that there is no statute or constitutional provision which forbids the operation of an amusement device of the kind described in the 1954 ordinance. Apparently, to the extent that they fail to prohibit the possession or control of machines such as described in the 1954 ordinance, the statutes of Ohio may be said to permit such possession or control. However, there is no statute or constitutional provision which authorizes the possession or control of such machines.

In disposing of a similar contention with respect to a Columbus ordinance which made it a crime to have "possession * * * custody, or * * * control" of "any ticket, check * * * slip * * * or document * * * used * * * as evidence * * * in * * * recording * * * an interest in a lottery," it was said in the opinion by Middleton, J., in City of Columbus v. Barr, 160 Ohio St., 209, 212, 115 N. E. (2d), 391:

"The ordinance merely goes further than the statute in prescribing a penalty for engaging in gambling transactions not covered by the statute. The ordinance is not inconsistent with the statute."

See also Village of Struthers v. Sokol, 108 Ohio St., 263, 140 N. E., 519, and Dallmann v. Kluckesky, 229 Wis., 169, 282 N. W., 9.

Arguments have been made with respect to the validity and interpretation of other provisions of the three Columbus ordinances involved in the instant cases. However, in view of our conclusion that the allegations of plaintiffs' petitions and the provisions of the 1954 ordinance require dismissal of plaintiffs' petitions, anything that we might say with respect to other provisions of those three ordinances or their validity would represent the consideration of something not necessary to sustain the judgments being rendered and hence might be considered as dicta.

Judgments affirmed.

Weygandt, C. J., Zimmerman, Bell and Matthias, JJ., concur.

Stewart, J., concurs in the judgment.

Herbert, J., dissents.

APPENDIX E

Judgment Entry of the Supreme Court of Ohio in the Benjamin Case

(Dated December 18, 1957)

This cause came on to be heard upon the transcript of the record of the Court of Appeals of Franklin county and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the court that there were

reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

It is further ordered that the appellees recover from the appellants their costs herein expended taxed at $.....

Ordered that a special mandate be sent to the Court of Appeals of Franklin county, to carry this judgment into execution.

Judgment Entry of the Supreme Court of Ohio in the Ferguson Case

(Dated December 18, 1957)

This cause came on to be heard upon the transcript of the record of the Court of Appeals of Franklin county and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

It is further ordered that the appellees recover from the appellants their costs herein expended taxed at $.....

Ordered that a special mandate be sent to the Court of Appeals of Franklin county, to carry this judgment into execution.

APPENDIX F

An Ordinance No. 156-53

To amend the Code of the city of Columbus, Ohio, 1952, Chapter 35, Public Amusements, Article III, Mechanical Amusement Devices, Division 1, Generally, Section 35.28, Definitions, Section 35.30, Seizure and Destruction of Gambling Devices, Division 2, Licenses and Registration, Section 35.33, Not To Be Issued for Gambling Devices, and to repeal said original sections.

Be it ordained by the council of the city of Columbus:

Section 1. That the Code of the city of Columbus, Ohio, 1952, Chapter 35, Public Amusements, Article III, Mechanical Amusement Devices, Division 1, Generally, Section 35.28, Definitions, be and the same is hereby amended to read as follows:

Section 35.28—Definitions.

1. Amusement arcade. An amusement arcade is defined as a place of amusement which derives in excess of seventy per cent of its gross receipts from the operation of mechanical or electrically operated amusement devices as defined in paragraph 3 of this section; provided, however, that in the case of any person operating a carnival and who operates an amusement arcade as a part thereof, the seventy per cent gross receipts referred to above shall apply only to the gross receipts of the amusement arcade and not to gross receipts of the operations of the carnival company.

2. Exhibitor. An exhibitor is defined as any person owning and exhibiting or contracting or permitting any mechanical amusement device, as defined in paragraph 3 of this section, to be installed, used and exhibited in his own place of business irrespective of the ownership of such device.

3. Mechanical amusement device. A mechanical or electrically operated amusement device is hereby defined as a machine, device or instrument which, upon the insertion of a coin, token or slug, operates, or may be operated for use as a game, contest of skill or amusement of any description, and which in no way tends to encourage gambling and which in no way is violative of the Code of the city of Columbus, Ohio, 1952, Chapter 29, Offenses—Miscellaneous, Sections 29.38, 29.38-1, 29.40, 29.42, 29.42-1 and 29.42-2 as the same are now enacted or as such sections may hereafter be amended. This definition is not intended to and does not include merchandise vending machines.

4. Owner. The owner is any person having title to any such mechanical amusement device, or amusement arcade as hereinabove defined. (Ord. No. 345-48.)

Sec. 2. That the Code of the city of Columbus, Ohio, 1952, Chapter 35, Article III, Mechanical Amusement Devices, Division 1, Generally, Section 35.30, Seizure and Destruction of Gambling Devices, be and the same is hereby amended to read as follows:

Section 35.30—Types of amusement devices that shall be seized, demolished and destroyed.

Any machine, device, instrument, apparatus or contrivance which tends to encourage gambling and may be used in a manner violative of the Code of the city of Columbus, Ohio, 1952, Chapter 29, Offenses—Miscellaneous, Sections 29.38, 29.38-1, 29.40, 29.42, 29.42-1 and 29.42-2, shall be seized, destroyed or demolished pursuant to the provisions of Sections 29.39, Gambling—Seizure and Destruction of Devices, Chapter 29, Offenses—Miscellaneous, of the Code of the city of Columbus, Ohio, 1952.

Sec. 3. That the Code of the city of Columbus, Ohio, 1952, Chapter 35, Public Amusements, Article III, Mechani-

cal Amusement Devices, Division 2, License and Registration, Section 35.33, Not To Be Issued For Gambling Devices per se, etc., be and the same is hereby amended to read as follows:

Section 35.33—Not to be issued for gambling devices.

The City Auditor shall not issue a license or a registration to any exhibitor, person or entity for any machine, device or instrument which tends on any way to encourage gambling which in any manner is violative of the Code of the city of Columbus, Ohio, 1952, Chapter 29, Offenses—Miscellaneous, Sections 29.38, 29.38-1, 29.40, 29.42, 29.42-1 and 29.42-2 as the same are now amended or as such sections may hereafter be amended.

Sec. 4. That original Section 35.28 and original Section 35.30, Division 1, Generally, and original Section 35.33, Division 2, all in Article III, Chapter 35 of the Code of the city of Columbus, Ohio, 1952, be and the same are hereby repealed.

Sec. 5. That this ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed March 9, 1953.

Joseph R. Jones,
President of Council.

Approved March 10, 1953.

R. T. Oestreicher, Mayor.

Attest:

Agnes Brown Cain, City Clerk.

APPENDIX G

An Ordinance No. 157-53

To amend the Code of the city of Columbus, Ohio, 1952, Chapter 29, Offenses—Miscellaneous, Section 29.38, Gambling—Permitting Prohibited, Section 29.39, Gambling—Seizure and Destruction of Gambling Devices, Section 29.42, Gambling—Slot Machines, Pinball Machines, etc., and repeal said original sections; and to amend the Code of the city of Columbus, Ohio, 1952, Chapter 29, Offenses—Miscellaneous, by enacting new Section 29.38-1, Gambling — Permitting Prohibited, new Section 29.42-1, Gambling Devices Prohibited, etc., and new Section 29.42-2, Coin Machines Prohibited.

Be it ordained by the council of the city of Columbus:

Section 1. That the Code of the city of Columbus, Ohio, 1952, Chapter 29, Offenses—Miscellaneous, Section 29.38 be and the same is hereby amended to read as follows:

Section 29.38—Devices encouraging or adaptable to gambling; seizure.

It is hereby declared prejudicial to the public good, detrimental to the public morals and a nuisance, for any person to exhibit for the purpose of operating or to permit the operation of any machine, device or instrument in the city of Columbus, Ohio, of whatever kind or description, or by whatever name known or commonly referred to which tends to encourage gambling, or which registers odds or a score, or which is adapted, or may readily be converted into such machine, device or instrument that is adapted, for use in a manner violative of Sections 29.38-1, 29.40, 29.42, 29.42-1 and 29.42-2 of this chapter, and every machine so exhibited or permitted to be operated shall be subject to seizure, by any police officer of the city, and no such machine, device

or instrument so seized by any police officer of the city, whether under the authority of this section or Section 29.39 or otherwise, shall be returned to the owner or person claiming the same except pursuant to an order of a court of competent jurisdiction.

Sec. 2. That the Code of the city of Columbus, Ohio, 1952, Chapter 29, Offenses—Miscellaneous, be and the same is hereby amended by the enactment and codification of new Section 29.38-1, Gambling—Permitting Prohibited, which shall read as follows:

Section 29.38-1—Gambling—permitting prohibited.

Whoever in the city permits any game whatsoever to be played for gain upon or by means of any machine, device or instrument, of whatever denomination or name, upon the premises of which he has the care or possession shall be fined not less than $50.00, nor more than $200.00, or imprisoned not more than six (6) months, or both.

Sec. 3. That the Code of the city of Columbus, Ohio, 1952, Chapter 29, Offenses—Miscellaneous, Section 29.39, Gambling—Destruction of Devices, be and the same is hereby amended to read as follows:

Section 29.39—Gambling—seizure and destruction of devices.

The Mayor, the Director of Public Safety, or any police officer shall seize, direct or cause to be seized any machine, device or instrument used for the purpose of gambling, or on, by, or with which money or any other thing or article of value may be won or lost, and all such machines, devices or instruments shall be demolished or destroyed under the direction of the Mayor or the Director of Public Safety, upon it being adjudged by the courts that such machines, devices or instruments were used, kept or intended for the purpose of gambling.

Sec. 4. That the Code of the city of Columbus, Ohio, 1952, Chapter 29, Offenses—Miscellaneous, Section 29.42, Gambling—Slot Machines, Pinball Machines, etc., be and the same is hereby amended to read as follows:

Section 29.42—Gambling machines, devices or instruments, etc.

Any person who shall within the city manufacture, assemble, repair or knowingly store, display or have in his possession for any commercial use, financial gain, or compensation, any coin or token operated gambling device, shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $500.00, and for a second or subsequent offense shall upon conviction be fined not exceeding $1,000.00, or to be imprisoned not to exceed eleven (11) months, or both. For the purpose of this section, "gambling device" shall mean and include any device having an automatic payoff or automatic free play mechanism or any device easily convertible to automatic payoff or free play by slight changes in, or addition to the mechanical structure, or any coin or token operated device actually used for gambling purposes, any of which in the operation of such device the player stands a chance to gain an award or property of greater value than the consideration paid.

Sec. 5. That the Code of the city of Columbus, Ohio, 1952, Chapter 29, Offenses—Miscellaneous, be and the same is hereby amended by the enactment and codification of new Section 29.42-1, Gambling Devices Prohibited, etc., which shall read as follows:

Section 29.42-1—Gambling devices prohibited.

Whoever keeps or exhibits for gain a coin-in-slot machine or device, where the merchandise, property or checks obtained by playing or operating such machine or device is not for each operation thereof substantially equal in value

or where the number of units of property or checks is not, for each operation, equal in number and value, shall be fined not less than $50.00 nor more than $500.00.

Sec. 6. That the Code of the city of Columbus, Ohio, 1952, Chapter 29, Offenses—Miscellaneous, be and the same is hereby amended by the enactment and codification of new Section 29.42-2 Gambling—Coin Machines Prohibited, which shall read as follows:

Section 29.42-2.—Gambling—coin machines prohibited.

Whoever exhibits, operates or permits the operation of any machine, device or instrument whether or not it purports to vend or distribute merchandise or to furnish recreation or amusement, which is caused to operate by the insertion of any token, slug or disc, or exhibits or operates or permits the operation of any machine, device or instrument which is caused to operate by the insertion of any coin whether such device, machine or instrument purports to vend or distribute merchandise or to furnish recreation or amusement, which as a result of such operation discharges one or more coins, tokens, slugs or discs or other memorandum, or which registers odds or a score of the result of operation which makes it possible for one user to receive more value than another user inserting a similar coin shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than $50.00, nor more than $500.00, or shall be imprisoned for not more than six (6) months, or both, and shall stand committed until such fine be paid or sentence served or until otherwise discharged by due process of law. Each day's violation shall constitute a separate offense.

Sec. 7. That original Section 29.38, original Section 29.39 and original Section 29.42 of Chapter 29, Offenses—Miscellaneous, of the Code of the city of Columbus, Ohio, 1952, be and the same are hereby repealed.

Sec. 8. That this ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed March 9, 1953.

Joseph R. Jones,
President of Council.

Approved March 10, 1953.

R. T. Oestreicher, Mayor.

Attest:

Agnes Brown Cain, City Clerk.

APPENDIX H

An Ordinance No. 1615-54

To prohibit the possession of pin-ball and certain other similar machines; to supplement the Code of the City of Columbus, 1952, by the enactment of Section 29.69-1 thereof; and to declare an emergency.

Whereas, the operation of pin ball machines and similar machines involving chance or skill or reward encourages gaming and the general disorder incident thereto, and is a threat or menace to the peace and morals of the community; and,

Whereas, even the so-called amusement-only pin-ball machines are so constructed as to be almost identical in appearance and operation to certain gambling devices, per se; and,

Whereas, even the vast majority of such so-called amusement-only devices are readily convertible to gambling devices; and,

Whereas, the operation of even amusement-only pin-ball machines has become and now constitutes a nuisance in that it encourges a false sense of values, idling, and loitering; and,

Whereas, an emergency exists in that such pin-ball machines are now generally absent from the city, but will return unless immediately prohibited; and for the immediate preservation of the public peace and safety; now, therefore,

Be it ordained by the council of the city of Columbus:

Section 1. That the Code of the City of Columbus, 1952, be and the same is hereby supplemented by the enactment of new Section 29.69-1 thereof, which said section shall read as follows:

"Section 29.69-1. Pinball Machines, Prohibited. Whoever shall within the city have in his possession, or in his custody or under his control any table game or device commonly known as a 'pin-game,' 'pin-ball game,' or 'marble game,' the operation, use or play of which is controlled by placing therein any coin, plate, disk, plug, key or other token, or by the payment of a fee, shall be guilty of a misdemeanor and upon conviction shall be filed not more than five hundred dollars, or imprisonment not more than six months, or both."

Sec. 2. That for the reasons stated in the preamble hereto, this ordinance is hereby declared to be an emergency measure and shall take effect and be in force from and after its passage and approval by the mayor.

Passed December 6, 1954.

O. J. Fillinger,

President of Council.

Approved December 7, 1954.

M. E. Sensenbrenner, Mayor.

Attest:

Agnes Brown Cain, City Clerk.

SUPREME COURT, U. S.

No. 884

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

RAY M. BENJAMIN, ET AL.,
Petitioners,

vs.

THE CITY OF COLUMBUS, ET AL.,
Respondents.

G. D. FERGUSON, ET AL.,
Petitioners,

vs.

THE CITY OF COLUMBUS, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

RUSSELL LEACH,
City Attorney.
JOHN W. E. BOWEN,
Chief Counsel.
JOHN C. YOUNG,
Senior Assistant City Attorney.
Counsel for Respondents.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

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CITATIONS TO OPINIONS BELOW

The opinion of the Common Pleas Court sustaining a motion for judgment on the pleadings in the Ferguson case is printed in Appendix A hereto, infra, pp. 9-23. Said opinion has not been supplied by petitioners and is not reported in either the official or unofficial state reports.

JURISDICTION

Respondents admit the jurisdiction of this court under 28 U. S. C., Section 1257 (3).

QUESTIONS PRESENTED

1. Should the writ of certiorari issue in this cause, respondents agree with petitioners that Question 1 as presented on page 3 of petitioners' brief would be before the court.

2, 3, and 4. Even though the writ issue, respondents deny that Questions 2, 3 and 4 as presented on pages 3 and 4 of petitioners' brief would be before the court.

5 and 6. Should the writ issue, respondents agree with petitioners that Questions 5 and 6 as presented on pages 4 and 5 of petitioners' brief would be before the court except that references therein to Ordinances Nos. 156-53 and 157-53 should be deleted.

7. Even though the writ issue, respondents deny that Question 7, as presented on page 5 of petitioners' brief would be before the court.

ORDINANCE INVOLVED

The only ordinance involved is No. 1615-54 (Volume 39, Columbus City Bulletin, p. 983), enacted by the council of the City of Columbus, Ohio, and printed in Appendix H, pp. 91-92 of petition for writ of certiorari.

STATEMENT OF THE CASES

Respondents concur in the statement of the cases as printed on pp. 6-8 of petitioners' brief.

REASONS FOR DENYING THE WRIT

1. The petitioners, in presenting those questions, which they deem to be raised by this case, have included in their brief questions 2, 3 and 4. These questions involve an interpretation of Ordinances 156-53 and 157-53. The respondents believe it to be extremely important that this court be alerted to the fact that neither 156-53 nor 157-53 are involved in the permissibility of the City of Columbus to prohibit pinball machines and in fact the questions became moot upon the passage of Ordinance 1615-54. To further explain the preceding sentences, it should be noted that Ordinances 156-53 and 157-53 attempted to regulate pin games by a licensing procedure, but the idea of licensing pin games was abandoned upon the passage of Ordinance 1615-54, which prohibited pin games entirely.

The respondents concede, for the sake of argument at this time, that there may be some federal questions involved in the interpretation of Ordinances 156-53 and 157-53, but inasmuch as these ordinances no longer affect the petitioners in any way, an answer by this court to the questions involved would merely be an abstract discussion of a hypothetical set of facts. The respondents wish to call the court's attention to *Ashwander v. T. V. A.*, 297 U. S., 288, and *Lee v. Bickel*, 292 U. S., 415, both of which held that the U. S. Supreme Court decides real controversies and does not discuss or give opinions to abstract or moot questions.

The petitioners have also raised the question of municipal police power to this court but the respondents contend that the Ohio Supreme Court in its decision of these cases, determined that municipal "police power" permitted Ohio municipalities is similar to the police power inherent in

the sovereign state. Therefore, this court cannot be concerned with the Ohio decision inasmuch as a decision of a state court of questions of state law is controlling upon the Supreme Court of the United States. *Memphis & C. R. Co. v. Pace*, 282 U. S., 241; *Greenaugh v. Tax Assessors*, 331 U. S., 486; *Great Northern R. Co. v. Sunburst Oil & Ref. Co.*, 287 U. S., 358; *Morehead v. New York ex rel. Tipaldo*, 298 U. S., 587.

2. One of the principal reasons for the allowance of a writ of certiorari is that there exists in the various state courts throughout the nation a conflict of decisions. However, the conflict must relate not to the result reached in each instance, but to a conflict of principle.

Upon review of the decisions set forth in the petitioners' brief concerning the matter of conflict of decision, the petitioners had cited twelve decisions which they contend to be in conflict with the instant case. However, these cases are in regard to criminal prosecution of pinball operators under gambling statutes. Therefore, it is the contention of the respondents that no conflict exists, inasmuch as the real question involved in these cases is whether or not the police power is extensive enough to prohibit those businesses or occupations which have dangerous or evil potentialities. Two of the decisions cited by the petitioners, *Urban's Appeal*, 148 Super. Ct., 101 (Penn.) and *Couch v. State*, 71 Okla. Cr., 223, do not conflict with the Ohio decision even if this court would deem the principle involved to be the same, for in those cases the courts held that pinball machines came within the meaning of gambling devices and were therefore subject to criminal prosecution under the gambling statutes.

It should be pointed out again, however, that the cases before this court on the writ of certiorari do not concern the prosecution of pinball operators by virtue of a gam-

bling statute but whether an Ohio municipality has the right to prohibit pinball machines because of their dangerous and evil potentialities which is in fact an application of police power.

The respondents in their brief before the Ohio Supreme Court cited the three cases of *Calcutt v. McGeachy*, 213 N. C., 1 (1937); *Woodward v. City of Lithonia*, 191 Ga., 234 (1940); and *Dallman v. Kluchesky*, 229 Wis., 234 (1938), each of which dealt with the right of a political subdivision to absolutely prohibit pinball machines either on the basis of being gambling devices or potentially dangerous devices so as to come within the municipality's police power. In the fifth paragraph of the syllabus in the *Dallman v. Kluchesky* case, supra, the Supreme Court of Wisconsin stated that:

> "5. Although the common council of the City of Milwaukee cannot by a declaration in an ordinance, change the character of a nickel-in-the-slot machine so as to make it a gambling device when in fact it is not, the council can nevertheless declare, and in the ordinance in question has in effect declared, that such machines, when in certain locations, constitute a public nuisance. p. 178".

Further, the Supreme Court of Georgia held in part in the first paragraph of the syllabus in the case of *Woodward v. City of Lithonia*, supra, that:

> "1. * * * The ordinance adopted on May 6, 1940, provided that 'it shall be unlawful for any person, firm, or corporation to own, maintain, or operate any pinball machine or similar machine, including all machines operated by depositing a coin therein for the playing of a game or the engaging in of any contest of chance or skill' held, that the adoption of the ordinance was within the charter power of the municipality".

Therefore, the only logical basis for the decision in each of the above state courts, whether the court based its deci-

sion upon "public nuisance" or upon "charter powers" could ultimately be traced to "police power" which is in agreement with the Ohio Supreme Court decision that the "municipal police power" is sufficiently broad to extend to the prohibition of pinball machines due to their evil potentialities.

3. With no intent on the part of the respondents to fully argue the merits of the questions presented by the petitioners to the court, the respondents wish to present briefly at this time the question of police power and in what manner such power relates to "due process of law", "equal protection of the law", and the "obligation of contracts".

"Police power" in a general sense is the right of a political subdivision to protect the public health, morals, safety and welfare of its subjects. It is also an elastic thing which must ever be expanded or contracted to meet the always changing needs of the public. Such police power is proper so long as its exercise is not unreasonable nor arbitrary.

Whether the exercise of the police power is arbitrary or unreasonable is a problem dependent upon (1) the public need, and (2) the contravention of each person's basic right to pursue whatever vocation he may choose. In the event that the public need is such as to demand that certain activities be prohibited, then, and at that time, the right of the individual must of necessity be subservient to that public need and the enactment of a statute or an ordinance prohibiting the named activity is a reasonable exercise of the police power.

Whether or not a political subdivision may prohibit those things which have dangerous or evil potentialities is not a new question to this court. In the case of *J. L. Murphy v. California*, 225 U. S., 623 (1912), the United States Supreme Court held in the first paragraph of the syllabus

that the prohibition of billiard parlors by a municipality was a proper exercise of police power. In the Supreme Court decision in that case the court referred to certain language used in *Booth v. Illinois*, 184 U. S., 425.

In the *Booth* case, supra, Justice Harlan in his opinion stated at page 429 as follows:

> "The argument then is, that the statute directly forbids the citizen from pursuing a calling which, in itself, involves no element of immorality, and therefore, by such prohibition it invades his liberty as guaranteed by the supreme law of the land. Does this conclusion follow from the premise stated? Is it true that the legislature is without power to forbid or suppress a particular kind of business, where such business, properly and honestly conducted, may not, in itself, be immoral? We think not. A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend the pursuit of a particular calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that subject, but is a clear unmistakable infringement of rights secured by the fundamental law."

As regards "due process", "equal protection", and "obligation of contracts" *Nebbia v. New York*, 291 U. S., 502, is a landmark case. In that instance the United States Supreme Court held that neither property rights or contract rights are absolute, and equally fundamental with either is the right of the public to regulate such rights in the common interest subject to constitutional restraints.

It is, therefore, the contention of the respondents that not only is there no conflict between the various state

court decisions, but the principle laid down by the *Murphy* case, supra, and the *Booth* case, supra, are in precise agreement with the decision of the Ohio Supreme Court in the cases now in question.

It is also the contention of the respondents that no reviewable federal question has been presented to this court because the mere contention that certain constitutional rights have been invaded when the questions involved have been settled by previous decisions of this court is insufficient ground for the allowance of the writ. *Utley v. St. Petersburg*, 292 U. S., 106.

4. The seventh question, in the petitioners' proposed questions to the court, states, in effect, that the Ohio Supreme Court refused to consider evidence placed before the trial court which tended to show that pinball games do not have evil potentialities.

In answer to the petitioners' contention, the respondents do not believe that there is any indication in the record of this case, nor in the decision of the Ohio Supreme Court which could possibly warrant such a conclusion. Further, it was held in the case of *U. S. v. Johnston*, 268 U. S., 220, that a writ of certiorari will not be granted by the U. S. Supreme Court for the purpose of reviewing evidence presented in the lower courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

RUSSELL LEACH,
City Attorney,
Attorney for Respondents.

APPENDIX A

Opinion of the Court of Common Pleas

(Rendered this 19th day of July, 1954.)

Harter, J.:

On defendants' motion, judgment on pleadings granted in favor of defendants; restraining order heretofore issued is dissolved; costs assessed against plaintiffs.

This action was instituted March 26, 1953, for injunctive relief. While the defendants interpreted the prayer of the petition as seeking relief by way of "Declaratory judgment" in addition to the injunction, the petition is perhaps not actually susceptible to such an interpretation and counsel for the plaintiffs, in their briefs, disclaim any and all desire for a declaration of rights. Accordingly, there will be no attempt in this opinion to treat of any "Declaratory judgment" problems.

The injunctive relief sought was that defendants be "restrained from interfering with or molesting" plaintiffs (and certain parties with whom plaintiffs had contracts) in the ownership and operation of their "amusement games generally designated as *pin games*".

A description of these *games*, in the exact language of the pleadings is appropriate. It is alleged in the petition and admitted in the amended joint answer that "said games are operated or played upon an inclined board approximately two feet in width by approximately four feet in length, which said board is covered by a glass surface; that at various points on said board there are openings, plastic bumpers and metal pins, on and under which are printed numerals from 1000 up to 100,000; that on the lighted back-glass are printed scores from 10,000 to 9,000,000; that to operate said game the player inserts a 5*c*

piece in a flat metal slide or into a drop shoot which protrudes from the end of said game; that said player then pushes said metal slide into the interior of said game; that there is thereby automatically released and ready for consecutive play on said board a given number of marbles or balls, depending upon the location where the games are played; that by pushing a plunger inward or by manually pushing a puck or ball, one marble or ball at a time is projected upward and into a slot immediately in front of said plunger; that the player thereupon pulls said plunger back and releases it; that said plunger then propels the marble or ball forward up the incline into the field of play and that said marble or ball strikes various pins or bumpers or flippers, and rolls downward and falls into one of the various openings."

While the plaintiffs in their petition have made additional allegations regarding the number of balls available to each player for 5c being equal to all players; objects in scoring; no prizes nor "free plays" being given; and that "amusement only" is received by the player—such allegations are all denied generally by the amended joint answer, and such allegations will therefore be ignored, of necessity, for the purpose of this opinion. Under the law, only "agreed" facts may be considered at this stage of this litigation. Parenthetically, conclusions of fact or law, alleged in the petition and denied in the answer may, of course, be ignored as having no significance at this stage of this litigation.

To point-up the respective theories of the parties to this litigation, it is, we believe, appropriate that we quote from the temporary restraining order which plaintiffs induced one branch of this court to sign on the day the action was commenced. That order contains the language of the plaintiff's counsel. By it a temporary restraining order

was allowed against the defendants, "as prayed for in the petition, so long as the pin games described in the petition are played *for the purpose of amusement only*, and so long as the players thereof do not win or receive, directly or indirectly, any merchandise, cash, checks, tokens, free-plays, or anything of value as a prize or reward for playing any of said pin games. In the event that any of said pin games are played *as gambling devices*, i.e. in the event that any merchandise, cash, tokens, checks, free-plays or anything of value is won or received, directly or indirectly, by the player as a prize or reward for playing any of said pin games described in the petition, or played as gambling devices in any way, the defendants shall be permitted to seize them whenever they are so played and to destroy them in accordance with law."

It is quite significant, as we see it, that plaintiffs' counsel have, in effect, thus injected their whole theory of gambling and these pin-game devices into the language of this restraining order; it is equally significant, as we see it, that the defendants have an entirely different theory regarding these pin-game devices, and do not deem the giving of prizes or "free plays" or the equality among players (in short, the "amusement only" phase of the case) as vital or material. While the attorneys for the defendants had no part in the choice of the language used in the temporary restraining order, they, in effect, did emphasize their view on this part of plaintiffs' theory by denying generally the allegations of the petition dealing with these problems in their joint amended answer, as explained above.

With this as the background, we believe we can succinctly state the issue of law presented by this motion for judgment on the pleadings as follows:

Should a court exercise its extraordinary injunctive powers to restrain police and city authorities from seizing and destroying the devices heretofore described even though they are, in practice, admittedly used for the purpose of amusement only (not gambling) under an ordinance, validly enacted, which condemns "any machine, device, instrument, apparatus or contrivance *which tends to encourage gambling* or which registers odds or a score, or *which is adapted*, or may *readily be converted* into such machine, device, or instrument that is adapted, for use in a manner violative of Sections 29.38-1, 29.40, 29.42, 29.42-1 and 29.42-2" of the ordinances of the City of Columbus?

We wish to emphasize the italicized phrases of the pertinent ordinance—"which tends to encourage gambling", "which is adapted" and "may readily be converted." In other words, *actual* use for gambling is not a prerequisite; "tending to encourage" and permissive use or possibility of, or adapting for, use, creates the test under the language of the ordinance. The quotation is from Ordinance No. 157-53 as enacted March 9, 1953, by the council of the City of Columbus.

Quite obviously from the language of the temporary restraining order (as prepared by counsel for the plaintiffs) and the repeated assertions contained in the briefs of the attorneys for the plaintiffs, the plaintiffs agree fully that pin-games which are actually used for "gambling" (with all the niceties of meaning of the term "gambling" which have been recognized by the courts through many years) are validly prohibited by the ordinances of the City of Columbus. It is only as to "amusement only" pin-games that plaintiffs can be said to be asking relief from the ordinances.

We, however, are of the opinion that pin-games which merely *tend to encourage* or *stimulate* the *gambling* in-

stinct are in such contravention of sound public policy that they may be condemned by an ordinance which validly exercises the police power of a municipality.

In this connection, we can quote from an Ohio Supreme Court case which summarizes our view and applies here as binding precedent: From Myers v. City of Cincinnati (1934) 128 Ohio State 235, 190 N. E. 569, we quote from page 238D:

> "Generally, the power of municipalities to enact and enforce police regulations within their boundaries is only limited by general laws in conflict therewith. Article XVIII, Section 3, Constitution of Ohio; 8 Ohio Jurisprudence, 347 et seq., 28 Ohio Jurisprudence, 101.
>
> "The constitutional provisions relied upon by plaintiff in error protect the citizen in his right to pursue any lawful business, but they do not prohibit legislation intended to control pursuits which because of their nature have injurious and harmful possibilities. Even if the slot machine involved in this case is manufactured and intended for lawful operations, its potentiality and design is such that it may be easily put to unlawful use. The regulation or prohibition of such a mechanism need not be postponed until such event occurs. This principle is expounded and applied in the following authorities:
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> "Murphy v. California, 225 U. S., 623, 56 L. Ed., 1229, 32 Sup. Ct., 697; City of Burlingame v. Thompson, 74 Kan., 393, 86 P., 449, 11 Ann. Cas., 64; City of Shreveport v. Dale, 149 La., 439, 89 So., 408; 6 Ruling Case Law, 220 et seq.
>
> "The city has the right to determine whether the exhibition, maintenance and operation of slot machines as defined in the ordinance are prejudicial to the public good. 8 Ohio Jurisprudence, 408."

Problems such as those here present may frequently be pointed-up by consideration of extreme cases. The case cited in the foregoing Ohio Supreme Court opinion, Murphy v. California, is such an extreme case. There billiard and pool halls were prohibited by a city ordinance.

That ordinance's constitutionality was challenged and the case went through to the United States Supreme Court in 1911 where the law was upheld. An extensive quotation from that opinion is appropriate here because it disposes of so many of the contentions presently advanced on behalf of the plaintiffs on both the "constitutional law" and "procedural law" phases of this case.

> "In 1908 the city of South Pasadena, California, in pursuance of police power conferred by general law, passed an ordinance which prohibited any person from keeping or maintaining any hall or room in which billiard or pool tables were kept for hire or public use, provided it should not be construed to prevent the proprietor of a hotel using a general register for guests, and having twenty-five bedrooms and upwards, from maintaining billiard tables for the use of regular guests only of such hotel, in a room provided for that purpose.
>
> "The plaintiff in error was arrested on the charge of violating this ordinance. His application for a writ of habeas corpus was denied by the Court of Appeals and Supreme Court of the State. In re Murphy, 8 Cal. App. 440; 155 California, 522. Thereafter the case came on for trial in the Recorder's Court, where the defendant testified that, at a time when there was no ordinance on the subject, he had leased a room in the business part of the city, and at large expense fitted it up with the necessary tables and equipments; that the place was conducted in a peaceable and orderly manner; that no betting or gambling or unlawful acts of any kind were permitted, and that there was nothing in the conduct of the business which had any tendency to immorality or could in the least affect the health, comfort, safety or morality of the community or those who frequented said place of business.' This evidence was, on motion, excluded and testimony of other witnesses to the same effect was rejected.
>
> "The defendant was found guilty and sentenced to pay a fine, or in default thereof to be imprisoned in the county jail. The conviction was affirmed by the

Superior Court of the County, the highest court to which he could appeal. The case was then brought here by writ of error, the plaintiff contending that the ordinance violated the provisions of the Fourteenth Amendment, claiming, in the first place, that in preventing him from maintaining a billiard hall it deprived him of the right to follow an occupation that is not a nuisance per se, and which therefore could not be absolutely prohibited.

"The Fourteenth Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public. Neither does it prevent a municipality from prohibiting any business which is inherently vicious and harmful. But, between the useful business which may be regulated and the vicious business which can be prohibited lie many non-useful occupations, which may, or may not be harmful to the public, according to local conditions, or the manner in which they are conducted.

"Playing at billiards is a lawful amusement; and keeping a billiard hall is not, as held by the Supreme Court of California on plaintiffs application for habeas corpus, a nuisance per se. But it may become such; and the regulation or prohibition need not be postponed until the evil has become flagrant.

"That the keeping of a billiard hall has a harmful tendency is a fact requiring no proof, and incapable of being controverted by the testimony of the plaintiff that his business was lawfully conducted, free from gaming or anything which could affect the morality of the community or of his patrons. The fact that there had been no disorder or open violation of the law does not prevent the municipal authorities from taking legislative notice of the idleness and other evils which result from the maintenance of a resort where it is the business of one to stimulate others to play beyond what is proper for legitimate recreation. The ordinance is not aimed at the game but at the place; and where, in the exercise of the police power, the municipal authorities determine that the keeping of such resorts should be prohibited, the courts cannot

go behind their finding and inquire into local conditions; or whether the defendant's hall was an orderly establishment, or had been conducted in such manner as to produce the evils sought to be prevented by the ordinance. As said in Booth v. Illinois, 183 U. S. 425, 429:

> 'A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law.'

"Under this principle ordinances prohibiting the keeping of billiard halls have many times been sustained by the courts. Tanner v. Albion, 5 Hill. 121; City of Tarkio v. Cook, 120 Missouri, 1; City of Clearwater v. Bowman, 72 Kansas, 92; City of Corinth v. Crittenden, 94 Mississippi, 41; Cole v. Village of Culbertson, 86 Nebraska, 160; Ex parte Jones, 97 Pac. Rep. 570.

"Indeed, such regulations furnish early instances of the exercise of the police power by cities. For Lord Hale in 1672 (2 Keble, 846), upheld a municipal by-law against keeping bowling alleys because of the known and demoralizing tendency of such places.

"Under the laws of the State, South Pasadena was authorized to pass this ordinance. After its adoption, the keeping of billiard or pool tables for hire was unlawful, and the plaintiff in error cannot be heard to complain of the money loss resulting from having invested his property in an occupation which was neither protected by the state nor the Federal Constitution, and which he was bound to know could lawfully be regulated out of existence.

"There is no merit in the contention that he was denied the equal protection of the law because, while he was prevented from doing so, the owners of a certain class of hotels were permitted to keep a room in which guests might play at the game. If, as argued, there is no reasonable basis for making a distinction between hotels with 25 rooms and those with 24 rooms or less, the plaintiff in error is not in position to complain, because not being the owner of one of the smaller sort, he does not suffer from the alleged discrimination.

"There is no contention that these provisions, permitting hotels to maintain a room in which their regular and registered guests might play were evasively inserted, as a means of permitting the proprietors to keep tables for hire. Neither is it claimed that the ordinance is being unequally enforced. On the contrary, the city trustees are bound to revoke the permit granted to hotels in case it should be made to appear that the proprietor suffered his rooms to be used for playing billiards by other than regular guests. If he allowed the tables to be used for hire he would be guilty of a violation of the ordinance and, of course, be subject to prosecution and punishment in the same way, and to the same extent, as the defendant."

As a passing comment on this opinion, it was pointed out in this case quite significantly that the ordinance there in question was not aimed at the *game* but at the *place*—i.e. the keeping of a "resort". If such a purpose was there upheld, it is quite obvious that a public policy aimed at a device which potentially might be, or become, a gambling device would have an even sounder basis for exercise of police power. As recognized by the United States Supreme Court, there is no necessity for postponement of the exercise of police power until the evil has become flagrant—i.e. here, until the gambling actually is taking place on the pin game.

The basic problems of law involved in the present litigation have been considered by the Ohio courts in various

kinds of cases. Two closely parallel cases have been decided in recent years; in one, a *replevin* action was brought by the owner of a pin game against the Cleveland chief of police after that plaintiff's pin games, which were admittedly not actually used for gambling currently, had been seized under a city ordinance much like our own Columbus ordinance. In that case, plaintiff's relief by way of replevin was refused. The case was taken to the Ohio Supreme Court where the appeal was dismissed on the ground that no debatable constitutional question was presented. We refer, in this connection to the case of Zellas et al. v. Matowitz (1941) 8 Ohio Supp. 66, 22 Ohio Opinions 261)appeal dismissed: 139 Ohio State 627, 41 N. E. (2d) 708).

In the second recently decided case, the plaintiff sought to enjoin the chief of police of Cincinnati from interfering with or confiscating his "Novelty merchantmen digger" machines. The issue was raised on a motion for a preliminary injunction. Evidence was not actually taken; the matter was argued and the court observed the plaintiff operate his machine some twenty times. The court refused the preliminary injunction. No appeal appears to have been taken from Judge Mack's decision there. The opinion is, however, particularly significant because it was rendered in an injunction suit, just like the present suit. Many of our procedural problems were there dealt with even though the machine or device there involved was quite different from the pin-game machines or devices here involved.

It would, of course, be appropriate for us in this opinion to quote extensively from these two opinions (particularly the Cleveland case, because the Supreme Court's ruling in finding no debatable constitutional question involved in it makes that case, in effect, a binding precedent on us insofar

as the constitutional question is concerned) but we doubt if any truly useful purpose would be served by our doing so. Rather, we choose to adopt the reasoning of those two cases here and refer the interested parties to those opinions for an amplification of the theories, as applied to facts closely parallel to our present facts, of the "substantive", as well as the "procedural", law dealing with this case.

In concluding that the injunctive relief which plaintiffs here seek should be denied, we are, we believe, following the precedents which have prevailed here in Franklin County for many years. Judge Randall of our Franklin County Common Pleas Court rendered an exhaustive, persuasive opinion on this general subject in the case of Snyder et al. v. McCune et al. (1931) 28 Ohio Nisi Prius Reports (new series) 506. In that opinion, Judge Randall carefully explained why injunctive relief should be refused in a case of this kind, basing his opinion on several unreported Court of Appeals and United States District Court opinions (from which he quoted extensively). We choose to follow his reasoning in that opinion without restating or paraphrasing it in this opinion.

The plaintiffs rely upon the decision of Judge Charles Bell of the Hamilton County Common Pleas Court in a 1953 case, entitled Westerhaus Company Inc. v. City of Cincinnati, et al. No. A-129385 in that court. In that case, a declaratory judgment was sought; an ordinance authorizing confiscation and destruction of amusement devices of the pinball type (so constructed as to make possible, either directly, or by adjustment, the return of cash or free-play or other privileges) was being challenged; there was no claim made there that there had been any "pay-off" of money or other tangible personal property on the pin-

ball machines in question; indeed, there, as here, the "amusement only" phase was apparently admitted by all parties. Judge Bell stated the issue which he was considering thus:

> "* * * the main question presented is whether 'free play', ipso facto, constitutes the devices involved herein as gambling devices per se. If the devices are not gambling devices per se, or are not being used for gambling purposes, then neither the Statutes of Ohio nor the Ordinance of the City of Cincinnati are being violated."

Again, to use Judge Bell's language:

> "This case, therefore, must be resolved by a determination of the question whether the operation of these devices violate any state statute."

We have no question regarding the soundness of Judge Bell's decision in his Hamilton County case; we do say, however, that the issue before him differed radically from the issue now being considered. We believe the foregoing quotations from his opinion conclusively demonstrate that difference. We are considering the extent of the police power of a municipality under *constitutional* limitations; Judge Bell was considering *statutes*, not the constitution.

Counsel for plaintiffs contend that, because the City of Columbus had licensed pin-games and recognized their legality until the present ordinance was passed, there should be a type of "estoppel" against such a change of position. We do not so understand the law. We believe a legislative body *can* change its position effectively and we believe the United States Supreme Court decision in the case of Murphy v. California, supra, explains the how and why of the constitutional law phases of such a problem.

Another contention advanced on behalf of plaintiffs is that the ordinances under attack contain phrases which are so "vague, indefinite and uncertain as to constitute a denial of due process of law." We do not agree. The answer to this contention, and to the further plaintiffs' contention to the effect that there has been an unlawful delegation of judicial and/or legislative power to administrative officers in these ordinances, is found in the theories so ably explained by Judge Reynolds in a case in our Common Pleas Court which went through to the United States Supreme Court recently, being affirmed all the way. We refer to the case of Motors Insurance Corporation v. Robinson, Superintendent (1951) 62 Ohio Law Abstracts 58, 106 N. E. (2d) 572. (Review denied, 344 United States 900.)

Standards, of course, must be laid down by the legislative branch of government but application of those standards may be an administrative act. The courts will, of course, review any claimed abuse of discretion by the administrative officer. See syllabus 8 and 9 of the Motors Insurance Corporation case, just cited.

While plaintiffs complain of a denial of equal protection of the laws, they admit that there may be reasonable classification. We believe there is reasonable classification here and that this litigation does not afford a suitable vehicle for challenge of any unfairness in enforcement. Arguments, and a decision in this field are moot and academic here. A true controversy on established facts is not present on this phase of the case. These observations are not intended, however, to suggest that *evidence* might be appropriate *in this case* on this point; rather, we mean to say that this issue cannot possibly come into the framework of this litigation.

Counsel for the plaintiffs have cited several Ohio cases squarely holding that injunctive relief may be sought and granted against criminal prosecutions where the law attempted to be enforced is unconstitutional and void and its enforcement will result in irreparable injury to vested property rights. We agree whole-heartedly with that rule of law but it simply is not applicable here; we hold the ordinances here under attack *are* constitutional and are *not* void. Quite obviously, therefore, the cases cited have no application.

Counsel for plaintiffs have referred in their briefs to a decision rendered by this branch of this court in January of this year in an appeal by one Phillip Gold from the Board of Liquor Control. That Gold decision was one of several rendered by this branch of this court to the effect that it was the duty of the legislature to prescribe workable standards for application by administrative officers. If no such standards are laid down, the administrative officers cannot fill the gap by exercising their own discretion. We still believe the Gold decision was right and, if it had any true application to the facts present in this pin-game controversy, we would be most willing to apply it here. We feel, however, that the standards for pin-games have been adequately defined in the challenged ordinances by the city's legislative branch and, therefore, the basic rule of the Gold opinion is not in point.

This branch of this court is fully aware of the fact that there are close shadings in the decisions of the courts in this area; we, personally, believe that, in general, "that government governs best which governs least"; we regret that ordinances such as those here under attack are deemed necessary. *But* we do not have power to substitute our judgment on questions of legislative policy for the judg-

ment of the Columbus city council. Our assignment, as a judge sitting in review of the constitutionality of ordinances is a limited, technical one:—we must inquire whether the constitutional guarantees afforded all citizens have been met and satisfied by the ordinances. Our conviction is strong here to the effect that the present ordinances are valid and enforceable.

Joseph M. Harter,
Judge.